(1)

No. 96-858-CFX Title: Martin D. Lambert, Gallatin County Attorney, Petitioner
v.
Susan Wicklund, et al.

Docketed:
November 29, 1996 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Nov 29 1996	Petition for writ of certiorari filed. (Response due January 13, 1997)
	Dec 23 1996	Order extending time to file response to petition until January 13, 1997.
	Jan 13 1997	Brief amici curiae of Nebraska, et al. filed.
	Jan 13 1997	Brief of respondents Susan Wicklund, et al. in opposition filed.
	Jan 24 1997	Reply brief of petitioner Martin Lambert filed.
	Jan 29 1997	DISTRIBUTED. February 14, 1997
	Feb 18 1997	REDISTRIBUTED. February 21, 1997
	Feb 24 1997	REDISTRIBUTED. February 28, 1997
	Mar 10 1997	REDISTRIBUTED. March 14, 1997
	Mar 17 1997	REDISTRIBUTED. March 21, 1997
	Mar 24 1997	REDISTRIBUTED. March 26, 1997
	Mar 31 1997	Petition GRANTED. Judgment REVERSED. Opinion by Justice Stevens concurring in the judgment with whom Justice Ginsburg and Justice Breyer join. Opinion per curiam.

****

Supreme Court, U.S.
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No. 96-

In The

Supreme Court of the United States

October Term, 1996

MICHAEL SALVAGNI, in his official capacity as Gallatin County Attorney,

Petitioner,

v.

SUSAN WICKLUND, M.D.; JAMES H. ARMSTRONG, M.D.; LINDSAY RICHARDS, M.D.; SUSAN CAHILL, P.A.; DOUGLAS WEBBER, M.D.; BETH E. THOMPSON, M.D.; MARY STRANAHAN, D.O.; and MARK MILES, M.D., on behalf of themselves and their patients throughout Montana, the surrounding states and Canada,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an immature minor's access to an abortion unduly burdened by a judicial bypass provision that conditions waiver of a parental notice requirement upon determination that such notice is not in her best interests?

LIST OF PARTIES

The Petitioner is Michael Salvagni in his official capacity as County Attorney for Gallatin County, Montana.

The Respondents are Susan Wicklund, James H. Armstrong, Lindsay Richards, Susan Cahill, Douglas Webber, Beth E. Thompson, Mary Stranahan, and Mark Miles.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Salvagni, in his official capacity as County Attorney for Gallatin County, Montana, respectfully requests that a writ of certiorari issue to review this opinion and judgment of the Court of Appeals for the Ninth Circuit entered in the proceeding below on August 16, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 93 F.3d 567 and is reprinted in the Appendix commencing at page 1a.

The opinion of the District Court is unreported and is reprinted in the Appendix commencing at page 13a.

JURISDICTION

Respondents challenged the constitutionality of the Parental Notice of Abortion Act, 1995 Mont. Laws ch. 469 (codified at Mont. Code Ann. §§ 50-20-201 to -205, -208, -209, -211 & -215 (1995)) under, inter alia, the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Jurisdiction before the District Court existed under 28 U.S.C. §§ 1331 and 1343. On September 27, 1995 the District Court entered judgment declaring the statute unconstitutional and enjoining its enforcement. Pet. App. 35a. On October 6, 1995 the Petitioner filed a notice of appeal from the judgment. Appellate jurisdiction existed below under 28 U.S.C. § 1291.

The Court of Appeals for the Ninth Circuit issued its opinion and judgment affirming the District Court's judgment on August 16, 1996. Pet. App. 1a. The Petitioner filed a timely petition for rehearing with suggestion for rehearing en banc on August 28, 1996. The petition for rehearing was denied on October 24, 1996. *Id.* 33a. Jurisdiction of this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Montana Parental Notice of Abortion Act provides in relevant part as codified in Mont. Code Ann. § 50-20-212(4) and (5) (1995):

> 50-20-212. **Procedure for judicial waiver of notice.**
>
> . . . .

> (4) If the court finds by clear and convincing evidence that the petitioner is sufficiently mature to decide whether to have an abortion, the court shall issue an order authorizing the minor to consent to the performance or inducement of an abortion without the notification of a parent or guardian.
>
> (5) The court shall issue an order authorizing the petitioner to consent to an abortion without the notification of a parent or guardian if the court finds, by clear and convincing evidence, that:
>
> (a) there is evidence of a pattern of physical, sexual, or emotional abuse of the petitioner by one or both parents, a guardian, or a custodian; or
>
> (b) the notification of a parent or guardian is not in the best interests of the petitioner.

The entirety of the Parental Notice of Abortion Act is reprinted in the Appendix commencing at page 23a.

STATEMENT OF THE CASE

This litigation was commenced under 42 U.S.C. § 1983 in November 1993 as a challenge to the parental notice provision in the Montana Abortion Control Act, Mont. Code Ann. § 50-20-107(1)(b) (1993). That provision, unchanged since its enactment in 1974, prohibited performance of an abortion "in the absence of . . . the written notice to a parent, if living, or the custodian or legal guardian of [the] woman if she is under 18 years of age and unmarried." No judicial or other bypass procedure

was provided under the Abortion Control Act for waiver of the notice requirement. In December 1993 petitioner Salvagni, the County Attorney for Gallatin County, Montana and the only defendant, stipulated to a judgment declaring this notice provision unconstitutional and enjoining its enforcement.

In 1995 the Montana legislature repealed § 50-20-107(1)(b) and adopted the Parental Notice of Abortion Act, 1995 Mont. Laws ch. 469 (codified at Mont. Code Ann. §§ 50-20-201 to -205, -208, -209, -211, -212 & -215 (1995)). Pet. App. 23a. The Act prohibits a physician from performing an abortion upon a minor or an incompetent person unless that physician or a referring physician has given 48 hours' actual notice to one parent or legal guardian of the patient concerning the intent to perform the abortion. § 50-20-204.[1] An alternate notification procedure is provided when actual notice has not been possible after a reasonable effort. § 50-20-205. Notice need not be given in several situations, including when it is waived judicially under § 50-20-212. § 50-20-206.

The judicial waiver process is confidential and initiated by the minor in the Montana youth court with a petition stating she is pregnant and unemancipated. § 50-20-212(2)(a). The youth court may appoint a guardian ad litem, while the petitioner may request court-

[1] The term "minor" is defined as "a female under 18 years of age who is not an emancipated minor." § 50-20-203(6). The term "incompetent person" is defined as "a person who is an incapacitated person or a protected person who has a guardian appointed pursuant to [Montana statutes]." § 50-20-203(4).

appointed counsel. *Id.* The court is directed to issue findings of fact and conclusions of law within 48 hours of the petition's filing unless an extension of time is requested by the petitioner; should findings and conclusions not be issued within that period, the notice requirement is deemed waived. § 50-20-212(3). The youth court must grant the petition if, by clear and convincing evidence, it finds "that the petitioner is sufficiently mature to decide whether to have an abortion" (§ 50-20-212(4)), "there is evidence of a pattern of physical, sexual, or emotional abuse of the petitioner by one or both parents, a guardian, or a custodian" (§ 50-20-212(5)(a)), or "the notification of a parent or guardian is not in the best interests of the petitioner" (§ 50-20-212(5)(b)). A petition's denial may be appealed to the Montana Supreme Court. § 50-20-212(8). The Act was scheduled to take effect on October 1, 1995.

In July 1995, however, the Respondents were granted leave under Fed. R. Civ. P. 15(d) to file a supplemental complaint. The complaint alleged Chapter 469 violated the substantive due process and equal protection rights of minor women under the Fourteenth Amendment and asserted jurisdiction under 28 U.S.C. § 1343. With respect to the due process claims, the Respondents contended that the confidentiality of a minor's identity would not be maintained because, under their construction of Mont. Code Ann. § 41-5-502(1) (1995), summons and proceedings under the Montana Youth Court Act generally must be served on the affected youth's custodial parent and because, under § 50-20-212(2)(b), any allegation of physical, sexual or emotional abuse as a basis for waiver of the notice requirement must be treated as a report under

Mont. Code Ann. § 41-3-202. The Respondents contended further that, by not requiring the Montana Supreme Court to adopt an expedited appeal process, the statute failed to provide an adequate bypass procedure. The equal protection claim alleged that Chapter 469 discriminated against a minor woman because, although requiring notice to a parent of such woman, the statute did not require notice "to the parent of the unmarried male who impregnated her."

In opposing the Petitioner's motion for summary judgment, the Respondents advanced for the first time the contention that the best interests criterion in § 50-20-212(5)(b) constitutes an undue burden because it fails to authorize waiver of the notice requirement if the youth court concludes that an abortion is in the minor's best interests – i.e., to pass constitutional muster the provision must authorize waiver if the court determines an abortion would be in the minor's best interests regardless of whether the evidence established the requisite basis for waiver of notice to a parent or guardian. The Respondents relied on *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991) (Pet. App. 37a), for this new contention.

The District Court addressed only the best interests issue. It first concluded, contrary to the Respondents' argument, that *Glick* was not dispositive because it "did not expressly hold that parental consent bypass standards apply in a notice context; instead, the statute was found unconstitutional on other grounds and the *Bellotti* [*v. Baird*, 443 U.S. 622 (1979)] problem 'only [added] to the infirmity.'" Pet. App. 18a. The court then "look[ed] to other courts for guidance on the issue" since, in its view, "[n]either the U.S. Supreme Court nor the Ninth Circuit

Court of Appeals [has] expressly decided what, if any, are the requirements of a judicial bypass procedure in a parental notice, as opposed to a parental consent, statute." *Id.* 19a.

The District Court's analysis of other circuit authority focused on *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1582 (1996). Characterizing the decision as "the only one to have [addressed the issue] in a fairly thorough manner" (Pet. App. 19a), the court construed the holding in *Sioux Falls Clinic* that parental notice must be accompanied by "a '*Bellotti*-type bypass'" (*Sioux Falls Clinic*, 63 F.3d at 1460) as meaning "*Bellotti* standards [must be applied] to determine the scope of the 'best interests' inquiry" and reasoned that, "[u]nder *Bellotti* and *Glick*, a minor must have an opportunity to show not just that notification is not in her best interests, but that having an abortion *is* in her best interests" (Pet. App. 21a). It therefore concluded § 50-20-212(5)(b) "impermissibly narrows the scope of the 'best interests' inquiry[ ] and places an undue burden upon the right of a minor who is able to show that abortion is in her best interests to obtain an abortion without parental involvement." *Id.* The District Court did not address the Petitioner's argument that the best interests standard in § 50-20-212(5)(b) was either identical to or substantively indistinguishable from the best interests provisions in the bypass statutes approved by this Court in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), and *Hodgson v. Minnesota*, 497 U.S. 417 (1990). The court did reject the Petitioner's contention that *Glick*'s reasoning was inconsistent with undue burden

principles as explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), with the comment that "*Casey* reaffirms that the State may not unduly burden a minor's access to abortion" and that "the imposition of a notification requirement, without an adequate *Bellotti-type* bypass provision, would constitute an undue burden." Pet. App. 21a n.5.

The Court of Appeals affirmed. Unlike the District Court, it reasoned that, "[w]hile there is some ambiguity in *Glick*, we cannot escape the conclusion that a reason for its holding that the Nevada provision was unconstitutional was that the judicial officer was required to determine whether parental notification, rather than the proposed abortion, was in the minor's best interests." Pet. App. 10a. Under law-of-the-circuit principles, the panel deemed itself bound by the prior decision. *Id.* 11a; *see, e.g., United States v. Mandel*, 914 F.2d 1215, 1221 (9th Cir. 1990). The Court of Appeals thus did not address the similarity of language between the Montana best interests provisions and those upheld in *Akron* and *Hodgson*, remarking only that "[e]ven if we thought *Glick* were inconsistent [with *Akron*], as a panel of this Court we would not be free to overrule it," and did not attempt to reconcile *Glick* with the later-decided *Casey*. Pet. App. 11a. The Petitioner's petition for rehearing with a suggestion for rehearing en banc subsequently was denied. *Id.* 33a.

REASONS FOR GRANTING THE PETITION

Perhaps no area of social policy is more sensitive than regulation of abortion. This Court thus observed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), that only two other decisional lines – the debate over substantive due process engendered by *Lochner v. New York*, 198 U.S. 45 (1905), and the debate over the separate-but-equal doctrine flowing from *Plessy v. Ferguson*, 163 U.S. 536 (1896) – were "of comparable dimension" during the last century. *Casey*, 505 U.S. at 861. Because of its sensitivity, this area of law has produced a complex and, at times, rather bewildering jurisprudence. *See Hodgson v. Minnesota*, 497 U.S. 417, 479-80 (1990) (Scalia, J., concurring in part & dissenting in part). Quite expectedly, state legislatures examine closely the formulation of abortion legislation that the Court has found constitutionally adequate and, as here, follow that formulation. This is thus not a case where the law is unresolved; it is one where the law is settled and the Court of Appeals' decision in *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), is simply wrong. Not only is the analysis in *Glick* at odds with *Hodgson* and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 507 (1990), but it also cannot be squared with *Casey* or the opinion *Glick* purports to follow, *Bellotti v. Baird*, 443 U.S. 622 (1979). The controversy, moreover, is not limited to Montana or even the Court of Appeals' jurisdictional reach since eleven other States, all but one outside the Ninth Circuit, have comparably-worded best interests provisions and since the Eleventh Circuit resolved the issue here in the opposite fashion only four days before *Glick* was issued. *Planned Parenthood Ass'n of Atlanta Area, Inc. v. Miller*, 934 F.2d 1462,

1476 n.21 (11th Cir. 1991). This Court should intervene to ensure doctrinal consistency is maintained.

I. *GLICK* IS INCOMPATIBLE WITH THIS COURT'S BYPASS PROCEDURE DECISIONS COMMENCING WITH *BELLOTTI*.

In *Bellotti*, this Court addressed the validity of a Massachusetts two-parent consent statute under which a superior court judge "for good cause shown" could authorize an abortion if one or both parents refused consent. *Bellotti*, 443 U.S. at 625. As construed by the Massachusetts Supreme Judicial Court, the statute required the superior court to withhold authorization for all minors, including those deemed mature, unless it determined that an abortion would be in the minor's best interests, and, except in unusual circumstances, precluded judicial authorization of an abortion without the minor's first seeking parental consent. *Id.* at 630.

Justice Powell's plurality opinion found those limitations "unduly burden[ed] the right to seek an abortion" (443 U.S. at 640) because a minor deemed sufficiently mature "to make intelligently the abortion decision on her own" (*id.* at 647) should be free to have that medical procedure without the necessity of even the superior court's consent. With respect to immature women, however, Justice Powell stated a "court may deny the abortion request . . . in the absence of parental consultation if it concludes that her best interests would be served thereby, or the court may defer decision until there is parental consultation in which the court may participate." *Id.* at

648. The *Bellotti* plurality opinion thus found no constitutionally-proscribed burden in a court's denying or delaying authorization of an abortion upon a determination that parental consultation was in the minor's best interests.

Because the *Bellotti* plurality opinion's discussion of the parameters of a valid bypass procedure was directed to a parental consent statute, an unanswered question was the extent to which a comparable procedure was constitutionally necessary in a statute conditioning access to abortions upon the less burdensome requirement of parental notice. *See H.L. v. Matheson*, 450 U.S. 396, 405 (1981) (upholding validity of Utah parental notice statute without a bypass procedure in as-applied challenge by unemancipated minor who "has made no claim or showing as to her maturity or as to her relationship with her parents"). This question was explored in *Hodgson* and *Akron*, cases involving the validity of parental notice statutes which also contained judicial bypass procedures. The Minnesota statute challenged in *Hodgson* provided then, and provides now, that, in resolving a bypass petition where a minor was not declared mature, "the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby." *Hodgson*, 497 U.S. at 427 n.9 (quoting Minn. Stat. Ann. § 144.343(6)(c)(ii) (West 1989)). The Ohio statute in *Akron*, also unchanged, provided that the court is required to authorize an abortion for an immature minor when "the

notification of the parents, guardian, or custodian of the complainant . . . is not in the best interests of the complainant." Ohio Rev. Code Ann. § 215.85(C)(2) (Anderson 1994)); *see Akron*, 497 U.S. at 508. The Ohio statute is thus identical to § 50-20-212(5)(b), while the Minnesota statute similarly requires the court to deny authorization for an abortion if notice to the minor's parents is deemed to be in her best interests.

Justice O'Connor's concurring opinion controlled in *Hodgson*, and she found Minnesota's two-parent notification requirement salvaged by the judicial bypass procedure "because the interference with the natural operation of the family required by [the notice provision] simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure." *Hodgson*, 497 U.S. at 461 (O'Connor, J., concurring). Justice Kennedy's plurality opinion in *Akron* effectively equated the Ohio statute's best interests provision with that in *Bellotti* (*Akron*, 497 U.S. at 511) and, without deciding whether any bypass procedure is constitutionally required in a single-parent notice statute, observed that "it is a corollary of the great intrusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute" (*id.*).

The Ohio and Minnesota best interests provisions did not stand at the periphery of the Court's decisionmaking in *Akron* and *Hodgson*. This is especially apparent in *Akron*, where any suggestion that the Court was unaware of the nature of the best interests standard in the Ohio law belies the analysis in the plurality, concurring and dissenting opinions. Justice Kennedy, speaking for six members of the Court on this point, summarized the best

interests standard (*Akron*, 497 U.S. at 508) and explicitly found it consistent with *Bellotti*, while Justice Stevens in his concurring opinion advanced the view that the Court in prior decisions had "squarely held that a requirement of pre-abortion parental notice in all cases involving pregnant minors is unconstitutional" unless "the State- . . . provide[s] an adequate mechanism for cases in which the minor is mature or *notice* would not be in her best interests" (*id.* at 522; emphasis supplied). Justice Blackmun's dissent argued that a parental notice statute was "tantamount to a parental-consent statute" and therefore must contain a bypass procedure comporting with *Bellotti*, but his opinion did not identify the best interests standard as one of the many deficiencies he saw in the Ohio statute.[2] In light of the careful scrutiny given the Ohio law in these opinions, it can hardly be assumed the Court did not recognize the nature of the best interests standard it upheld. It instead is likely the determination concerning the consistency of the Ohio best interests formulation with *Bellotti* standards recognized that the minor variation in the best interests criteria merely reflected the differing focus of the bypass procedures – i.e., whether consent to a minor's abortion is appropriate

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[2] Justice Blackmun criticized the Ohio bypass process because it required a minor to choose among three forms when filing a bypass complaint (*Akron*, 497 U.S. at 527-29), lacked the requisite anonymity (*id.* at 529-31), failed to guarantee an expeditious decision (*id.* at 531-33), contained a constructive authorization provision which he believed served only "to frustrate the minor's right to an expedient disposition of her petition" (*id.* at 535), and impermissibly imposed a clear and convincing, rather than a preponderance, burden of proof on the minor (*id.* at 534-38).

as opposed to whether notice of an intended abortion to a parent is appropriate – and that, under *Bellotti*'s reasoning, even a consent bypass decisionmaker has the discretion to direct parental consultation when deemed in the minor's best interests. *See H.L.*, 450 U.S. at 420 (Powell, J., concurring) (restating view that under *Bellotti* "a State may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that *notification* otherwise would not be in her best interests") (emphasis supplied).

The Court of Appeals' error, however, seems plain without regard to *Bellotti*, *Akron* and *Hodgson*. The validity of a parental notice statute, no less than other forms of abortion regulation, must be measured against undue burden principles. *Casey*, as the most definitive statement of those principles, cannot be reconciled with *Glick*. The plurality opinion in *Casey*, while reaffirming the "essential holding" in *Roe v. Wade*, 410 U.S. 113 (1973), that a woman has the right to make "the ultimate decision to terminate her pregnancy before viability" (*Casey*, 505 U.S. at 869, 879), nevertheless made clear that "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so" (*id.* at 877). Consequently, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.*

The best interests factor in § 50-20-212(5)(b) does not constitute such an obstacle because, at most, it requires parental notice where a neutral third party has concluded that an immature minor's interests would be furthered by such notification. *See Casey*, 505 U.S. at 895 (parental notice and consent statutes "are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart"). Given the presumptive appropriateness of parental consultation, the contention that a best interests standard of the kind in § 50-20-212(5)(b) imposes an undue burden is implausible and conflicts directly with the reasoning and result in *Casey*. Confusion over, if not outright conflict between, this Court's rulings and lower court decisions concerning legislative authority in such an important area of social regulation should not be left unresolved.

II. THE COURT OF APPEALS' DECISION BRINGS INTO QUESTION THE VALIDITY OF PARENTAL NOTICE STATUTES IN NINE OTHER STATES WITHOUT ANY SUBSTANTIVE ANALYSIS OF THE BEST INTERESTS ISSUE.

It is hardly surprising in view of *Bellotti*, *Akron* and *Hodgson* that all bypass procedures in parental notice statutes employ a best interests standard substantively identical to the Minnesota, Montana and Ohio provisions,[3] while almost all bypass provisions in consent

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[3] Ark. Code Ann. § 20-16-804(1)(B) (Michie 1991) ("whether the performance of an abortion upon [the minor] without notification of her parents, guardian or custodian would be in her best interests"); Del. Code Ann. tit. 24, § 1784(b) ("it is in the

statutes use a standard identical to that approved in *Bellotti*.[4] The slightly different phrasing between these

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best interest of the minor that notification . . . be waived") (Interim Supp. 1995); Ga. Code Ann. § 15-11-114(c)(2) (Harrison 1994) ("the notice to a parent or . . . a legal guardian or person standing in loco parentis . . . would not be in the best interests of the minor); Ill. Ann. Stat. ch. 750, ¶ 70/25(d)(2) (Smith-Hurd Supp. 1996) ("notification . . . would not be in the best interests of the minor or incompetent person"); Iowa Code § 135L.4.3.e(2) (1996 Iowa Legis. Serv. No. 1) (West) ("notification is not in the best interest of the pregnant minor"); Kan. Stat. Ann. § 65.6705(d)(2) (1992) ("notification of a person specified in [the statute] would not be in the minor's best interest"); Neb. Rev. Stat. § 71-6903(1) (1993) ("whether the performance of an abortion upon [the minor] without notification of her parent would be in her best interests"); Nev. Rev. Stat. Ann. § 442.255.2(c) (1991) ("[t]he notice required by [the statute] would be detrimental to [the minor's] best interests"); and W. Va. Code § 16-2F-4(f)(2) (1995) ("notification to the person or persons to whom such notification would otherwise be required would not be in the best interest of the minor petitioner"); *see also* Md. Code Ann., Health-General, § 20-103(c)(iii) (Supp. 1995) (authorizing physician to omit parental notice when "[n]otification would not be in the best interest of the minor").

[4] *Compare* Ala. Code § 26-21-4(f)(2) (1992) ("performance of the abortion would be in the best interest of the minor"); Cal. Health & Safety Code § 123450(c)(2) (West 1996) ("performance of the abortion would be in the best interest of the minor"); Ind. Code Ann. § 16-34-2-4(d) (Burns 1993) ("an abortion would be in the minor's best interests"); Ky. Rev. Stat. Ann. § 311.732(4)(b) (Michie/Bobbs-Merrill Supp. 1995) ("performance of the abortion would be in the minor's best interest"); Me. Rev. Stat. Ann. tit. 22, § 1597-A.6.D(2) (1992) ("[f]ind the abortion to be in the best interest of the minor"); Mass. Gen. Laws Ann. ch. 112, § 12S (West 1996) ("performance of an abortion upon [the minor] would be in her best interests"); Miss. Code Ann. § 41-41-55(4)(b) (1993) ("performance of the abortion would be in the best interests of the minor"); Mo. Rev. Stat.

best interests standards makes practical sense because under a notice statute the minor, not a parent or a court, possesses final decisionmaking power concerning whether an abortion is warranted and because the bypass proceeding's sole purpose is to determine whether waiver of the *notice* requirement is appropriate. A court in a notice bypass proceeding, unlike one in a parental consent bypass proceeding, thus does not act as a surrogate parent with respect to the ultimate prudence of the requested abortion. Focus on the appropriateness of notification also makes constitutional sense because under a notice statute any burden arises from the requirement

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§ 188.028.2(3)(b) (1994) ("the abortion [is found] to be in the best interests of the minor"); R.I. Gen. Laws § 23-4.7-6 (1989) ("performance of an abortion upon [the minor] would be in her best interests"); S.C. Code Ann. § 44-41-33(A)(2) (Law. Co-op. Supp. 1995) ("performance of the abortion would be in the minor's best interest"); Tenn. Code Ann. § 37-10-304(e)(2) (1991) ("performance of the abortion would be in the minor's best interests"); Wis. Stat. Ann. § 48.375(7)(c)2 (West Supp. 1995) ("performance or inducement of the abortion is in the minor's best interests"); and Wyo. Stat. § 35-6-118(b)(v)(C) (Supp. 1995) ("[a]uthorize the abortion based upon a finding by clear and convincing evidence that the abortion is in the best interest of the minor"), *with* Ariz. Rev. Stat. Ann. § 36-2152.B (West 1996 Supp.) ("authorize a physician to perform the abortion without consent if the judge concludes that the pregnant minor's best interests would be served"); and Mich. Comp. Laws Ann. § 722.904(3)(b) (West 1993) ("[t]he waiver [of the parental consent requirement] would be in the best interests of the minor"); *see also* La. Rev. Stat. Ann. § 1299.35.5.B(6) (West Supp. 1996) (under judicial consent statute, court must determine whether "the abortion would be in the best interest of the minor").

that a minor's parent be notified and, to the extent notification is deemed in her best interests, that burden cannot be characterized as undue under the Fourteenth Amendment.[5]

The Court of Appeals' decision therefore blurs a core distinction between notice and consent statutes and casts doubt on the validity of parental notice statutes throughout the Nation. It does so without any substantive discussion of the underlying issue or even a modest effort to explain, in light of the statutes upheld in *Akron* and *Hodgson*, how the Montana best interests standard could constitute an undue burden on an immature minor's access to abortion. *Glick* itself is unhelpful in this regard, since it likewise failed to reconcile its holding with the

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[5] It warrants mention that nothing precludes a notice bypass decisionmaker from considering the appropriateness of the abortion when it determines whether parental notification should occur, any more than a parental consent bypass decisionmaker, as indicated in *Bellotti*, 443 U.S. at 648, is foreclosed from concluding that judicial consent to an abortion should not be given until parental consultation has taken place. Indeed, at least one State has codified this aspect of *Bellotti*. La. Rev. Stat. Ann. § 40:1299.35.5.B(5) (West Supp. 1996) (requiring court under judicial consent statute to notify parents of requested abortion if such notice deemed in the minor's best interest and to "reconvene the proceedings within forty-eight hours with the parents or guardian present to advise and counsel the minor and aid the court in making its determination whether or not the abortion would be in the best interest of the minor"). The critical difference between notice and consent statutes nonetheless remains since the notice bypass decisionmaker *must* authorize the abortion once it determines parental notification would not be in the minor's best interests, regardless of whether it believes an abortion is.

language of the statutes upheld in those cases.[6] The decision below represents, in short, an instance where an issue of national importance has been resolved without analysis of controlling opinions from this Court on the basis of a prior, quite flawed circuit court opinion.

III. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE ELEVENTH CIRCUIT'S OPINION IN *MILLER*.

Review is appropriate, finally, because *Glick* and the decision below conflict with *Miller*. The statute in question there was a Georgia parental notice law virtually identical to Montana's, including its best interests provision that authorized waiver of the notice requirement if the notice was not in the minor's best interests. *Miller*, 934 F.2d at 1468 (citing Ga. Code Ann. § 15-11-114(c)(2)). The court of appeals noted that the issue whether a judicial waiver procedure was required under a parental notice statute arguably was unresolved but found it

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[6] The failure to recognize, or at least discuss, the similarity may have derived from the absence of any challenge by the *Glick* plaintiffs to the Nevada statute's best interests criterion. In their supplemental brief filed after *Hodgson* and *Akron* were decided, they distinguished the Minnesota and Ohio statutes from the Nevada law solely on procedural, confidentiality and expediency grounds. *See* Supp'l Br. Pls./Appellees at 4-9, *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991) (No. 85-2335). The Court accepted only the last of the plaintiffs' contentions. 937 F.2d at 440-42. The *Glick* plaintiffs also did not question the validity of the best interests criterion in their brief filed prior to the *Hodgson* and *Akron* decisions. *See* Br. Resp't at 31-40, *id.* The panel in *Glick* accordingly decided an issue not raised or briefed by the parties.

unnecessary to address the issue since the Georgia law satisfied *Bellotti* standards. *Id.* at 1476 n.21. The only *Bellotti* element the Georgia provision failed to meet "precisely," the court stated, was the requirement that the bypass decisionmaker determine whether the abortion was in the minor's best interests. That difference, however, was deemed "constitutionally [in]significant" because the Ohio statute sustained in *Akron* employed language indistinguishable from the Georgia best interests provision. *Id.* at 1477 n.21.

The court of appeals' analysis in *Miller* is correct, but for present purposes the more salient point is that its analysis is irreconcilable with the holding in *Glick* and the decision below. Although the issue over which the circuit courts disagree is narrow, it is critical in view of the formulation of the best interests provision in *every* parental notice statute with a judicial bypass procedure. Not resolving this conflict will serve only to foster confusion where none should exist.[7]

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[7] The District Court's reliance on *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1582 (1996), warrants brief mention. The issue there was whether *any* bypass procedure is constitutionally required in a single-parent notice statute. *Id.* at 1458. Although recognizing the issue has not been resolved definitively by this Court, the court of appeals looked chiefly on *Hodgson* for the proposition that "States may generally require the parent's involvement in an immature minor's abortion decision because it is presumed that a parent will act in the minor's best interest" but that, "if the minor can show that an abortion without notification would be in her best interest, then the State has no further reason requiring such notice." *Id.* at 1460. Section 50-20-212(5)(b), like best-interests provisions in other notice bypass statutes, embodies precisely the standard that *Sioux Falls Clinic* found mandated constitutionally. The Eighth Circuit's conclusion that "a *Bellotti*-bypass" process must be made available where notice to only one parent is required does not mean, as the District Court supposed, an undue burden arises by framing the best-interests inquiry as whether parental notice, rather than the abortion itself, is in the minor's best interests. It instead means merely that a bypass procedure comparable to those upheld in *Hodgson* and *Akron* must be included in a notice statute. Rather than supporting the District Court's determination, the Eighth Circuit's decision thus counsels against it. That said, *Sioux Falls Clinic* did not resolve directly the question presented here, since the South Dakota law contained no best interests provision and since the Petitioner has not contended that no bypass procedure is required constitutionally under a parental notice statute.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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November 1996

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN WICKLUND, M.D.; JAMES H. ARMSTRONG, M.D.; LINDSAY RICHARDS, M.D., SUSAN CAHILL, P.A.; DOUGLAS WEBBER, M.D.; BETH E. THOMPSON, M.D.; MARY STRANAHAN, D.O.; and MARK MILES, M.D., on behalf of themselves and their patients throughout Montana, and surrounding states and Canada, *Plaintiffs-Appellees,* *v.* MICHAEL SALVAGNI, *Defendant-Appellant.*	No. 95-36028 D.C. No. CV-93-00092-JFB OPINION

Appeal from the United States District Court
for the District of Montana
James F. Battin, District Judge, Presiding

Argued and Submitted
July 10, 1996 – Seattle, Washington

Filed August 16, 1996

Before: Thomas M. Reavley,* Stephen Reinhardt, Charles Wiggins, Circuit Judges.

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* Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Opinion by Judge Reinhardt

COUNSEL

Clay R. Smith, Assistant Attorney General, Helena, Montana, for the defendant-appellant.

Simon Heller, Center for Reproductive Law and Policy, New York, New York, for the plaintiff-appellee.

OPINION

REINHARDT, Circuit Judge:

The issue in this case is whether a Montana statute that requires that minors notify a parent before obtaining an abortion is constitutional. The statute provides for a form of "judicial bypass" of its parental notification provision for certain minors. Plaintiffs filed an action in district court contending that the notification statute was unconstitutional because the bypass was inadequate. The district court found the statute unconstitutional. On appeal the parties explore a number of difficult issues. We do not reach them because we conclude that we are bound by our earlier decision in *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), and therefore affirm.

Background and Procedural History

In November 1993, six physicians, a physician assistant, and an organization providing abortion services brought suit on behalf of Dr. Susan Wicklund as well as minors of Montana and neighboring states challenging Montana's Abortion Control Act, Mont. Code Ann.

§ 50-20-107(1)(b) (1993). The Act required minors to notify their parents before obtaining an abortion. It did not provide for a judicial or alternate bypass procedure through which a qualified minor could avoid giving notice in appropriate circumstances. In December 1993, the District Court issued an order permanently enjoining the enforcement of Mont. Code Ann. § 50-20-107(1)(b), based on a stipulation by the defendant that the provision was unconstitutional.

In direct response to that court order, the Montana Legislature repealed § 50-20-107 and passed a new parental notification law entitled the Parental Notice of Abortion Act (the Act). Mont. Code Ann. § 50-20-201 *et seq* (1995). That Act, which is now before us, prohibits a physician from performing an abortion upon a minor or an incompetent person unless that physician or a referring physician has given 48 hours actual notice to one parent or a legal guardian of the patient concerning the intent to perform the abortion. Mont. Code Ann. § 50-20-204. Notice need not be given under certain circumstances, including when it is waived judicially under Mont. Code Ann. § 50-20-208. Section 50-20-212's bypass provision states:

> **Procedures for judicial waiver of notice**
>
> (2) (a) The minor or incompetent person may petition the youth court for a waiver of the notice requirement and may participate in the proceedings on the person's own behalf.
>
> (4) If the court finds by clear and convincing evi dence that the petitioner is sufficiently mature to decide whether to have an abortion,

> the court shall issue an order authorizing the minor to consent to the performance or inducement of an abortion without the notification of a parent or guardian.
>
> (5) The court shall issue an order authorizing the petitioner to consent to an abortion without notification of a parent or guardian if the court finds by clear and convincing evidence, that:
>
> (b) *the notification of a parent or guardian is not in the best interests of the petitioner.*

Plaintiffs filed a motion for leave to file a supplemental complaint to challenge the constitutionality of the act, which the district court granted. The parties filed cross-motions for summary judgment, and the district court granted plaintiffs'. The district court determined that a minor who seeks to bypass parental notification and shows that *an abortion is in her best interests* must be able to obtain an abortion without notifying a parent or guardian. The County Attorney appeals.

Analysis

Over the last 15 years, the Supreme Court has examined the circumstances under which states may require parental *consent* before allowing a minor to procure an abortion. *E.g., Ohio v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*Akron I*); *Planned Parenthood Association of Kansas v. Ashcroft*, 462 U.S. 476 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979). Where a minor is insufficiently mature or emancipated to make the abortion decision for herself, the state may require such consent. *Bellotti*, 443 U.S. at 640 (plurality opinion). However, if the state does

so, the statute must also include a means by which "qualified" minors may circumvent the requirement. *Id.* at 643; *see also Akron I*, 462 U.S. at 439-40. That typically comes in the form of a "judicial bypass." A judicial bypass is designed to allow the minor the opportunity to persuade the court to allow her to have an abortion without having to notify a parent and obtain parental consent. Under *Bellotti*, a minor is entitled to avoid having to a bypass [sic] if she can show either:

> (1) that she is mature enough and well informed enough to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

Bellotti, 443 U.S. at 643-44 (plurality opinion); *see also Akron II*, 497 U.S. at 511-13 (citing *Bellotti*). In addition, "[t]he proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti*, 443 U.S. at 644.

The Supreme Court has left open the question of whether or not a judicial bypass to a parental notification provision (such as the one at issue here) is constitutionally required. The Court considered the constitutionality of a notification provision in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (*Akron II*), but avoided deciding whether a bypass was required. In *Akron II*, the Court first considered whether the notice

bypass of the Ohio statute met the test for a consent-bypass set forth in *Bellotti*:

> In analyzing this aspect of the dispute, we note that, although our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures. We leave the question open, because, whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures, H.B. 319's bypass procedure meets the requirements identified for parental consent statutes in *Danforth*, *Bellotti*, *Ashcroft*, and *Akron*. [I]t is a corollary to the greater inclusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute.

Akron II, 497 U.S. at 510-11. Because the Court concluded that the notice-bypass provision satisfied the *Bellotti* standard, it did not reach the question whether a notice-bypass is constitutionally required, and if so, what form it must take.[1]

Appellees contend that the Montana statute is unconstitutional because it does not provide for a bypass as a matter of right to those minors who can show that *an abortion is in their best interests*. Justice Powell's opinion in *Bellotti*, 443 U.S. at 643, and subsequent cases make clear that where a minor can show that (1) she is sufficiently mature to make her own decision whether to have an abortion or (2) an abortion is in her best interests, state

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[1] The Supreme Court has suggested that an administrative as well as a judicial bypass might be valid under parental consent statutes. *Bellotti*, 443 U.S. at 643 n.22.

law must allow her to obtain that abortion without obtaining parental consent. *Akron II*, 497 U.S. at 510-11. Apparently in obedience to that dictate, the Montana statute allows mature minors to avoid parental notification. However, unlike in states with consent statutes, minors in Montana who can show that an abortion is in their best interests may nevertheless be compelled to comply with the parental notification requirement.

Appellees argue that if a minor is willing to go to court, undergo the emotional strain and practical difficulties of the judicial bypass procedure, and establish that it is in her best interests to have an abortion, her actions demonstrate that she is so afraid or unwilling to inform her parents that forcing her to do so would constitute an undue burden on her right to have an abortion. Appellees contend, therefore, that a minor who is unalterably opposed to letting her parents know of her condition, and her plans for an abortion, should be able to obtain a waiver of the parental notification requirement simply by showing that having an abortion is in her best interests. They argue that whatever the judge may think objectively of the wisdom of a minor's notifying her parents, the question is a highly subjective one, and if, in the end, the young woman is sufficiently distressed by the prospect of a hostile or abusive parental reaction that she is unwilling to notify them, then the notification requirement will necessarily constitute an undue burden. In short, the argument goes, if a young woman *in whose best interests it is to have an abortion* is too afraid or humiliated to tell her parent that she is pregnant, she must be able to avoid the notification requirement, whether or not a court concludes that it would be in her best interests to give the

statutorily mandated notice. Otherwise, say appellees, the minor may in effect be precluded from having the abortion that is in her best interests and that she fervently desires.[2]

Appellant vigorously disagrees. He contends that it is in fact *less* burdensome for a minor to demonstrate that notification is not in her best interests than it is for her to show that an abortion is. He also argues that appellees' concerns about the bypass provision's being linked to a minor's showing that notification is not in her best interests are misplaced because the judge conducting the bypass hearing may consider any argument the minor makes as to why an abortion is in her best interests in making his ultimate decision as to whether parental notification will be waived. Next, he points to the manifold benefits that flow from parental counseling, whether or not the minor desires it, and points out that no one is in a better position to give desperately needed advice to a young person at what is surely the most critical point in her life. Finally, appellant maintains that because in a notice statute, unlike in a consent statute, the ultimate decision as to whether to have an abortion, rests with the minor, it is appropriate that the judge consider whether notification rather than the abortion is in her best interests.

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[2] Appellees' arguments bring to mind the statement of Justice Kennard in her dissenting opinion in *American Academy of Pediatricians v. Lungren*, 51 Cal. Rptr. 201 (1996), *rehearing granted*, May 22, 1996. "Not every pregnant adolescent has parents out of the comforting and idyllic world of Norman Rockwell." *Id.* at 224 (Kennard, J., dissenting).

If we were considering this issue for the first time, we would be faced with a difficult constitutional problem; for there is considerable force to each side of the argument, and the Supreme Court has not made clear what the Constitution requires. However, *this court* has already spoken. In *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), we found unconstitutional a Nevada parental notification statute with a "best interests" bypass standard that was virtually identical to the one at issue here. The bypass provision of the Nevada statute provided that a minor seeking an abortion could bypass parental notification if she could show that "*the notice* . . . would be detrimental to her best interests." Nev. Rev. Stat. § 442.255(2)(c) (1995) (emphasis added). In *Glick*, we held that statute unconstitutional in part because the quoted provision "impermissibly constricted the meaning of 'best interests.' " 937 F.2d at 442.

In *Glick*, which was decided after *Akron II*, we first pointed out that Nevada's statute failed to allow the minor "to show that even if she cannot make the abortion decision by herself, the desired abortion would be in her best interests." *Glick*, 937 F.2d at 438-39. We then said that the omission of such a provision contravened the requirements of *Bellotti*. *Id.* Specifically, we noted that Nevada's bypass procedure,"both at the initial judicial interview and at the petition hearing, allows the minor to show that *parental notification* would not be in her best interests, and requires the court to authorize the abortion in such instances." *Id.* at 438. We then stated, "[t]he language of these provisions does not meet the requirement of *Bellotti*. *Id.* at 439. Rather than requiring the reviewing court to

consider the minor's 'best interests' generally, the Nevada statute requires the consideration of 'best interests' only with respect to the possible consequences of parental notification." We continued, "[f]urthermore, in *Bellotti*, the court expressly stated, '[i]f, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization *without any parental involvement*.' " *Id.* (citing *Bellotti*, 443 U.S. at 648) (emphasis added). Then came the critical language. The *Glick* court concluded that "the Nevada statute impermissibly narrows the Bellotti 'best interests' criterion, and *is unconstitutional*." *Id.* (emphasis added).

While there is some ambiguity in *Glick*, we cannot escape the conclusion that a reason for its holding that the Nevada provision was unconstitutional was that the judicial officer was required to determine whether parental notification, rather than the proposed abortion, was in the minor's best interests. The ambiguity occurs because, after explicitly declaring that the best interests standard employed in the statute is *"unconstitutional," Glick* went on to say, "[b]ecause we hold that the Nevada bypass procedure does not meet the constitutional requirements of a consent statute, we must consider whether it meets the requirements of the less intrusive notification statute." *Glick*, 937 F.2d at 441 (citing *H.L. v. Matheson*, 450 U.S. 398, n.17 (1981)). Then, *Glick* proceeded to reexamine Nevada's bypass procedure. It is this reexamination that appellant contends permits us to avoid the holding that Nevada's best interests provision was unconstitutional. Unfortunately for appellant, however, our reexamination did not change our conclusion.

While we would be reluctant in any event to disregard a flat determination by our court that a statutory provision is "unconstitutional," we certainly cannot disregard such a determination in this case. For in *Glick* we stated our conclusion not once, but twice. Toward the end of *Glick* we stated for the second time that the Nevada bypass mechanism was constitutionally inadequate. 937 F.2d at 442. The second time we did so in the section in which we reexamined the adequacy of the bypass provision. After carefully conducting that reexamination, we stated, in connection with our discussion of another constitutional flaw in the provision:[3] "that Nevada has *impermissibly constricted* the meaning of 'best interests' only adds to the infirmity." *Glick*, 937 F.2d at 442 (emphasis added). There can be no doubt after that second declaration of constitutional impermissibility that *Glick* stands for the proposition that the type of best interests bypass provision set forth in the Nevada statute cannot pass constitutional muster. Because the best interests bypass provision of the Montana statute is, for all practical purposes, identical to the Nevada provision, it cannot either.

Appellant contends that we should "overrule" *Glick* because it is inconsistent with the Supreme Court's decision in *Akron II*. We disagree. Even if we thought Glick were incorrect, as a panel of this court we would not be free to overrule it. *Glick* was issued subsequent to *Akron*

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[3] The flaw that we considered principally in the latter part of *Glick*, was the failure of the statute to guarantee an expedient resolution of the bypass proceeding because it did not set time limits within which the judge was required to rule on the minor's petition. 937 F.2d at 440-41.

II; in fact, the *Glick* court vacated submission of the case to await the Supreme Court decision in *Akron II*. It was not only aware of that opinion, it considered it and relied on it in reaching its conclusion. We are therefore not free simply to disregard *Glick*. Accordingly, we must uphold the district court's determination that the Montana bypass provision is unconstitutional.

We need not reach appellees' other argument, which the district court also did not consider, that Montana's statute fails adequately to protect the anonymity of minors who petition for notice bypass. Because Montana's statute does not meet the best interests requirement set forth in *Glick v. McKay*, the district court order granting appellees' motion for summary judgment is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

SUSAN WICKLUND, M.D., et al., Plaintiffs, v. MICHAEL SALVAGNI, in his individual capacity and in his official capacity as Gallatin County Attorney, Defendant.	No. CV 93-92-BU-JFB MEMORANDUM AND ORDER

(Filed Sep. 27, 1995)

Pending before the Court are cross-motions for Summary Judgment by Plaintiffs and Defendant. To expedite the decision, and with the parties' concurrence, the matters raised are deemed submitted without the need for oral argument. After considering the briefs and supporting documents submitted, the Court rules as follows.

This action was originally filed on November 23, 1993. The Plaintiffs sought an order enjoining Defendant from enforcing Mont. Code Ann. § 50-20-107(1)(b), which required parental notification before an abortion could be performed on a minor. This Court entered a Temporary Restraining Order on November 30, 1993, enjoining Defendant from enforcing Mont. Code Ann. § 50-20-107(1)(b). The Temporary Restraining Order

remained in effect until the Court entered a final judgment on December 21, 1993. The Judgment, based on the parties' stipulation, permanently enjoined enforcement of Mont. Code Ann. § 50-20-107(1)(b) because it was unconstitutional. On July 17, 1995, this Court granted Plaintiffs' Motion for Leave to File a Supplemental Complaint. Plaintiffs are currently contesting the constitutionality of HB 482, a new parental notification provision that was signed into law by Montana Governor Marc Racicot on April 15, 1995.[1] The law is scheduled to go into effect on October 1, 1995.

The Plaintiffs and Defendant agree that it is a matter of law to be decided by the Court as to whether HB 482 is constitutional. The law at issue requires parental notice for unemancipated minors and incompetent persons seeking abortions. HB 482, § 4.[2] An "emancipated minor" is defined as "a person under 18 years of age who is or has been married or who has been granted an order of limited emancipation by a court as provided in 41-3-406." HB 482 § 3(3). Section 9 provides for judicial waiver of

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[1] The law is entitled "AN ACT REQUIRING PARENTAL NOTIFICATION PRIOR TO AN ABORTION FOR A MINOR OR INCOMPETENT PERSON; PROVIDING A JUDICIAL WAIVER OF NOTIFICATION; PROVIDING PENALTIES; AMENDING SECTION 41-1-405, MONT. CODE ANN.; AND REPEALING SECTION 50-20-107, MONT. CODE. ANN." A copy of the law is attached as an Appendix to this ruling.

[2] Section 4 provides: **Notice of parent required.** A physician may not perform an abortion upon a minor or an incompetent person unless the physician has given at least 48 hours' actual notice to one parent or to the legal guardian of the pregnant minor or incompetent person of the physician's intention to perform the abortion.

the notice requirement and is at the heart of the motions presently pending. Section 9 provides that a minor "may petition the youth court for a waiver of the notice requirement and may participate in the proceedings on the person's own behalf." The petition may be granted by the youth court and the notice requirement waived pursuant to four different alternatives. These include:

(1) "If the court fails to rule within 48 hours and the time is not extended." § 9(3).

(2) If the court finds that petitioner is "sufficiently mature to decide whether to have an abortion." § 9(4).

(3) If the court finds that "there is evidence of a pattern of physical, sexual, or emotional abuse of the petitioner by one or both parents, a guardian, or a custodian." § 9(5)(a).

(4) If the Court finds that "the notification of a parent or guardian is not in the best interests of the petitioner." § 9(5)(b).

Plaintiffs claim that Section 9 of HB 482 is unconstitutional, for four reasons.[3] First, because a minor must

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[3] The Plaintiffs assert in a footnote that HB 482 is also invalid because section 7, which provides that "public assistance benefits may not be used [by an emancipated minor] to obtain an abortion," violates Title XIX and the Hyde Amendment. *See,* Pls' Br. In Supp. of Pls' Mot. for Summ. J., p.6 n.3 (citing *Planned Parenthood of Missoula Inc. v. Blouke,* 858 F.Supp. 137 (D. Mont. 1994)). The Court will not address this issue because it was not properly raised and briefed. Plaintiff also initially challenged the lack of an expedited appeals procedure for the judicial bypass proceedings. However, in the

petition the youth court for a waiver of notice, the Plaintiffs argue that Mont. Code. Ann. § 41-5-502(1), which requires service of a summons on a petitioner's parents after a petition is filed in youth court, effectively notifies the minor's parents of the judicial waiver procedure.[4] Second, Plaintiffs argue that the provision allowing for waiver if notification of the parents would not be in the best interests of the petitioner, improperly narrows the consideration of what is in the minor's overall "best interests." *Glick v. McKay*, 937 F.2d 434, 438 (9th Cir. 1991). Third, Plaintiffs argue that if the minor seeks a waiver of notification based on abuse, constructive notice to the minor's parents will occur because the youth court will initiate an investigation of the home pursuant to Mont. Code Ann. § 41-3-202. Finally, Plaintiffs argue that the statute violates the Equal Protection Clause of the U.S. Constitution. Defendant has moved for summary judgment on the first, third and fourth claims. Plaintiffs have filed a cross-motion for summary judgment on the first, second and third grounds. Because the Court decides the motions in favor of Plaintiffs on the basis of the second ground, concerning the scope of the "best interests" inquiry, it will not address the remaining grounds for summary judgment asserted by either party.

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interim the Montana Supreme Court has adopted such a procedure and Plaintiffs' challenge to the adequacy of the bypass provision on that basis is therefore moot.

[4] **Mont. Code Ann. § 41-5-502. Summons.** (1) After a petition has been filed, summons must be served directly to: (a) the youth; (b) his parent or parents having actual custody of the youth or his guardian or custodian, as the case may be; and (c) other person as the court may direct.

A. Best Interests Inquiry

One ground for summary judgment raised by Plaintiffs concerns the scope of the "best interests" inquiry to be conducted by the youth court, in determining whether judicial bypass of the notice requirement is appropriate. The United States Supreme Court has stated that in judicial bypass proceedings in the context of a parental consent statute,

> A pregnant minor is entitled to show the court either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

Bellotti v. Baird, 443 U.S. 622, 640-642 (1979); *see also Ohio v. Akron Center for Reproductive Health* ("*Akron II*"). 497 U.S. 502, 511 (1990). It is also well established that because of the greater intrusiveness of parental consent requirements, a notice-bypass provision that meets the requirements of a consent-bypass provision passes constitutional muster. *Akron II*, 497 U.S. at 511. Plaintiffs do not contend that the Montana parental notification statute does not meet the first requirement, and the Court specifically finds that it does. However, the "best interests" inquiry under *Bellotti* requires that in judicial bypass proceedings, a minor be given a chance to show that the **abortion** would be in her best interests. This is noticeably different than the inquiry under the Montana statute, which waives notification only if the Court first finds that **notification** would not be in the minor's best interests.

The Eleventh Circuit Court of Appeals has noted the distinction between these two standards, but did not believe that the difference was "constitutionally significant." *See Planned Parenthood Ass'n of Atlanta v. Miller*, 934 F.2d 1462, 1477 n.21 (11th Cir. 1991). However, the Ninth Circuit Court of Appeals, which controls this Court's decisionmaking, has a different view.

In *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), the Ninth Circuit Court of Appeals applied the *Bellotti* standards for a parental consent judicial bypass statute to a notification statute, and found that it did not pass constitutional muster because the statute required an inquiry into whether notification, not abortion, was in the minor's best interests. *Id.* at 439. The *Glick* Court quoted *Bellotti*, stating that

> "[i]f, *all things considered*, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement." *Bellotti*, 443 U.S. at 648, 99 S.Ct. at 3050 (emphasis added). Therefore, the Nevada statute impermissibly narrows the *Bellotti* "best interests" criterion, and is unconstitutional.

Id. However, the *Glick* Court did not expressly hold that parental consent bypass standards apply in a notice context; instead, the statute was found unconstitutional on other grounds and the *Bellotti* problem "only [added] to the infirmity." *Id.* at 442.

In the context of a parental **consent** statute, the Court would have no problem applying *Glick* to determine that a judicial bypass provision focusing the "best interests" inquiry upon the narrow issue of notification, rather than

the broader issue of whether an abortion is in the minor's best interests, is unconstitutional. However, the present case involves a parental **notification** statute, not a parental consent statute. Neither the U. S. Supreme Court nor the Ninth Circuit Court of Appeals have expressly decided what, if any, are the requirements of a judicial bypass procedure in a parental notice, as opposed to a parental consent, statute. This Court looks to other circuits for guidance on the issue.

The Eighth Circuit Court of Appeals has addressed the same issue, and is the only one to have done so in a fairly thorough manner. *See Planned Parenthood, Sioux Falls Clinic v. Miller*, ___ F.3d ___, 1995 WL 513959 (8th Cir. (S.D. 1995)). In *Miller*, the court began by noting that "the Supreme Court has established that the State may require parental notice for immature minors who cannot show that an abortion would be in their best interests." *Id.*, 1995 WL 513959 at *5 (citing *H.L. v. Matheson*, 450 U.S. 398, 409 (1981)). However, "the Supreme Court has yet to decide whether a mature or "best interest" minor is unduly burdened when a State requires her physician to notify one of her parents before performing the abortion." *Id.* To resolve that issue, the Eighth Circuit considered the reasons why "requiring parental notice – or, for that matter parental consent – is not an undue burden upon immature minors who cannot show that an abortion would be in their best interests." *Id.* The answer, in the view of the Eighth Circuit, "is that they are minors, and States may impose requirements on immature minors that it may not impose on adults." *Id.* at *6 (citations omitted).

When dealing with a mature minor, the state's attempt to give parents power over the abortion decision

is on a collision course with the Constitution. *Id.* (citing *Bellotti*, 443 U.S. at 643-44 & n. 23). "By showing that they are capable of mature, informed consideration, such minors establish that the State has no legitimate reason for imposing a restriction on their liberty interests that it could not impose on adult women." *Id.*

In the case of an immature minor whose best interests would be served by having an abortion, "the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child." *Id.* (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 454 (1990)). "But if the minor can show that an abortion without notification would be in her best interest, then the State has no further reason for requiring such notice." *Miller*, 1995 WL 513959 at *5.

> For both mature and "best interest" minors, then, the State has no legitimate interest in imposing a parental notice requirement with the purpose or effect of placing a substantial obstacle in their paths when they seek previability abortions. **For this reason, we hold that the State may not impose a parental-notice requirement without also providing a confidential, expeditious mechanism by which mature and "best interest" minors can avoid it. In short, parental notice provisions, like parental-consent provisions, are unconstitutional without a "Bellotti-type bypass."**

Id. (emphasis added).

This Court agrees with the thoughtful reasoning of the Eighth Circuit, and further believes that the Ninth

Circuit, having held in *Glick* that a notice-bypass provision must meet constitutional scrutiny, *see Glick*, 937 F.2d at 442, would also apply the *Bellotti* standards to determine the scope of the "best interests" inquiry required. *See also Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *aff'd* 484 U.S. 171 (1988), (parental notice statute could only withstand constitutional scrutiny if it provided a bypass procedure consistent with *Bellotti II*) (citing *Indiana Planned Parenthood Affiliates Ass'n. v. Pearson*, 716 F.2d 1127 (7th Cir. 1983)). After all, the failure of the Nevada statute to meet the *Bellotti* standards was one of the two reasons given for holding the parental notice statute unconstitutional. *Glick*, 937 F.2d at 442. Under *Bellotti* and *Glick*,[5] a minor must have an opportunity to show not just that notification is not in her best interests, but that having an abortion **is** in her best interests. The Montana judicial bypass statute does not conform with the *Bellotti* standards, impermissibly narrows the scope of the "best interests" inquiry, and places an undue burden upon the right of a minor who is able to show that abortion is in her best interests, to obtain an abortion without parental involvement. It is therefore unconstitutional.

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[5] Defendant argues that *Glick* is no longer good law, after *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992). However, nothing in *Casey* alters the Court's reasoning above. To the contrary, *Casey* reaffirms that the State may not unduly burden a minor's access to abortion. *Casey*, 112 S.Ct. at 2821. As noted above, the imposition of a notification requirement, without an adequate *Bellotti-type* bypass provision, would constitute an undue burden upon the right of a mature or "best interest" minor to have an abortion.

B. Arnott's Renewed Motion to Intervene

Finally, there is a "Renewed Motion to Intervene as Defendant by Representative Arnott." This Motion was filed on September 14, 1995, three days after the Court denied Representative Arnott's original Motion to Intervene. Representative Arnott argues that she should have the opportunity to intervene because her interests are not adequately represented by the Attorney General. She bases this argument on the fact that the Attorney General has not filed a motion to sever Section 12 of HB 482, from the rest of the bill.[6] However, the Defendant has stated that section 12 is severable and that the motions at issue only address the constitutionality of sections 1-10 of HB 482. *See* Com. Rep. Br. in Supp. of Def's Mot. for Summ. J., p.16 n.5. The Court concludes that this is not a proper basis for Arnott to intervene and further concludes that any potential interests of Arnott are, as previously stated in the Memorandum and Order of September 11, 1995, adequately represented. Wherefore,

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment is granted and Defendant's Motion for Summary Judgment is denied. Sections 1 through 10 of Montana HB 482 are hereby declared unconstitutional, and Defendant is permanently enjoined from enforcing those sections.

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[6] Section 12 provides: RIGHT OF INTERVENTION. PURSUANT TO RULE 24(A), MONTANA RULES OF CIVIL PROCEDURE, A LEGISLATOR HAS THE RIGHT TO INTERVENE IN ANY CASE IN WHICH THE LEGALITY OF TITLE 50, CHAPTER 20, IS CHALLENGED.

IT IS FURTHER ORDERED that the Representative Arnott's Renewed Motion to Intervene is denied.

The Clerk is directed to enter Judgment accordingly and notify counsel of record and Mr. Timothy J. Whalen of this Order.

DONE AND DATED this 27th day of September, 1995.

/s/ James F. Battin
Senior U.S. District Judge

HOUSE BILL NO. 482

REFERENCE BILL
AS AMENDED

INTRODUCED BY GRIMES, MARTINEZ, ESTRADA, BAER, HARGROVE, WELLS, MCGEE, MILLER, REHBEIN, SOFT, BRAINARD, GREEN, SIMPKINS, STOVALL, TASH, MASOLO, MOHL, FOSTER, COLE, HAYNE, BENEDICT, PECK, HERRON, FORBES, MARSHALL, KNOX, DEVANEY, DEVLIN, GROSFIELD, BROWN, MCCANN, ZOOK, HARDING, VICK, ORR, L. SMITH, BERGMAN, TVEIT, ANDERSON, KEATING, KASTEN, MOLNAR, AHNER, HERTEL, MERCER, CURTISS, EMERSON

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING PARENTAL NOTIFICATION PRIOR TO AN ABORTION FOR A MINOR OR INCOMPETENT PERSON; PROVIDING A JUDICIAL WAIVER OF NOTIFICATION; PROVIDING PENALTIES; AMENDING SECTION 41-1-405, MCA; AND REPEALING SECTION 50-20-107, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 10] may be cited as the "Parental Notice of Abortion Act".

NEW SECTION. **Section 2. Legislative purpose and findings.** (1) The legislature finds that:

(a) immature minors often lack the ability to make fully informed choices that take into account both immediate and long-range consequences;

(b) the medical, emotional, and psychological consequences of abortion are sometimes serious and can be lasting, particularly when the patient is immature;

(c) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related;

(d) parents ordinarily possess information essential to a physician in the exercise of the physician's best medical judgment concerning the minor;

(e) parents who are aware that their minor daughter has had an abortion may better ensure that the daughter receives adequate medical care after the abortion; and

(f) parental consultation is usually desirable and in the best interests of the minor.

(2) The purpose of [section 1 through 10] is to further the important and compelling state interests of:

(a) protecting minors against their own immaturity;

(b) fostering family unity and preserving the family as a viable social unit;

(c) protecting the constitutional rights of parents to rear children who are members of their household; and

(d) reducing teenage pregnancy and unnecessary abortion.

NEW SECTION. **Section 3. Definitions.** As used in [section 1 through 10] unless the context requires otherwise, the following definitions apply:

(1) "Actual notice" means the giving of notice directly in person or by telephone.

(2) "Coercion" means restraining or dominating the choice of a minor female by force, threat of force, or deprivation of food and shelter.

(3) "Emancipated minor" means a person under 18 years of age who is or has been married or who has been granted an order of limited emancipation by a court as provided in 41-3-406.

(4) "Incompetent person" means a person who is an incapacitated person or a protected person who has had a guardian appointed pursuant to Title 72, chapter 5.

(5) "Medical emergency" means a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of the woman's pregnancy to avert the woman's death or a condition for which a delay in treatment will create serious risk of substantial and irreversible impairment of a major bodily function.

(6) "MINOR" MEANS A ~~MALE OR~~ FEMALE UNDER 18 YEARS OF AGE WHO IS NOT AN EMANCIPATED MINOR.

~~(6)~~(7) "Physical abuse" means any physical injury intentionally inflicted by a parent or legal guardian on a child.

~~(7)~~(8) "Physician" means a person licensed to practice medicine under Title 37, chapter 3.

~~(8)~~(9) "Sexual abuse" has the meaning given 41-3-102.

NEW SECTION. **Section 4. Notice of parent required.** A physician may not perform an abortion upon a minor or an incompetent person unless the physician has given at least 48 hours' actual notice to one parent or to the legal guardian of the pregnant minor or incompetent person of the physician's intention to perform the abortion. The actual notice may be given by a referring physician. The physician who performs the abortion must receive the written statement of the referring physician certifying that the referring physician has given actual notice. If actual notice is not possible after a reasonable effort, the physician or the physician's agent shall give alternate notice as provided in [section 5].

NEW SECTION. **Section 5. Alternate notification.** In lieu of the actual notice required by [section 4], notice may be made by certified mail addressed to the parent at the usual place of residence of the parent with return receipt requested and delivery restricted to the addressee, which means a postal employee may deliver the mail only to the authorized addressee. Time of delivery is

considered to occur at noon on the next day on which regular mail delivery takes place after mailing.

NEW SECTION. **Section 6. Exceptions.** Notice is not required under [section 4 or 5] if:

(1) the attending physicians certifies in the patient's medical record that a medical emergency exists and there is insufficient time to provide notice;

(2) notice is waived, in writing, by the person entitled to notice; or

(3) notice is waived under [section 9].

NEW SECTION. **Section 7. Coercion prohibited.** A parent, a guardian, or any other person may not coerce a minor to have an abortion. If a minor is denied financial support by the minor's parents, guardian, or custodian because of the minor's refusal to have an abortion, the minor must be considered an emancipated minor for the purposes of eligibility for public assistance benefits. The public assistance benefits may not be used to obtain an abortion.

NEW SECTION. **Section 8. Reports.** A monthly report indicating the number of notices issued under [sections 1 through 10] and the number of times in which exceptions were made to the notice requirement under [section 6], as well as the type of exceptions, must be filed with the department of health and environmental sciences on forms prescribed by the department. Patient names AND OTHER IDENTIFYING INFORMATION may not be used on the forms. The department shall prepare and made available to the public on an annual basis a compilation of the data reported.

NEW SECTION. **Section 9. Procedure for judicial waiver of notice.** (1) The requirements and procedures under this section are available to minors and incompetent persons whether or not they are residents of this state.

(2)(a) The minor or incompetent person may petition the youth court for a waiver of the notice requirement and may participate in the proceedings on the person's own behalf. The petition must include a statement that the petitioner is pregnant and is not emancipated. The court may appoint a guardian ad litem for the petitioner. A guardian ad litem is required to maintain the confidentiality of the proceedings. The youth court shall advise the petitioner of the right to court-appointed counsel and shall provide the petitioner with counsel upon request.

(b) If the petition filed under subsection (2)(a) alleges abuse as a basis for waiver of notice, the youth court shall treat the petition as a report under 41-3-202. The provisions of Title 41, chapter 3, part 2, apply to an investigation conducted pursuant to this subsection.

(3) Proceedings under this section are confidential and must ensure the anonymity of the petitioner. All proceedings under this section must be sealed. The petitioner may file the petition using a pseudonym or using the petitioner's initials. All documents related to the petition are confidential and are not available to the public. The proceedings on the petition must be given preference over other pending matters to the extent necessary to ensure that the court reaches a prompt decision. The court shall issue written findings of fact and conclusions

of law and rule within 48 hours of the time that the petition is filed unless the time is extended at the request of the petitioner. If the court fails to rule within 48 hours and the time is not extended, the petition is granted and the notice requirement is waived.

(4) If the court finds by clear and convincing evidence that the petitioner is sufficiently mature to decide whether to have an abortion, the court shall issue an order authorizing the minor to consent to the performance or inducement of an abortion without the notification of a parent or guardian.

(5) The court shall issue an order authorizing the petitioner to consent to an abortion without the notification of a parent or guardian if the court finds, by clear and convincing evidence, that:

(a) there is evidence of a pattern of physical, sexual, or emotional abuse of the petitioner by one or both parents, a guardian, or a custodian; or

(b) the notification of a parent or guardian is not in the best interests of the petitioner.

(6) If the court does not make a finding specified in subsection (4) or (5), the court shall dismiss the petition.

(7) A court that conducts proceedings under this section shall issue written and specific findings of fact and conclusions of law supporting its decision and shall order that a confidential record of the evidence, findings, and conclusions be maintained.

(8) The supreme court may adopt rules providing an expedited confidential appeal by a petitioner if the

youth court denies a petition. An order authorizing an abortion without notice is not subject to appeal.

(9) Filing fees may not be required of a pregnant minor who petitions a court for a waiver of parental notification or appeals a denial of a petition.

NEW SECTION. **Section 10. Criminal and civil penalties.** (1) A person convicted of performing an abortion in violation of [section 4 or 5] shall be fined an amount not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(2) Failure to provide the notice required under [section 4 or 5] is prima facie evidence in an appropriate civil action for a violation of a professional obligation. The evidence does not apply to issues other than failure to notify the parents or guardian. A civil action may be based on a claim that the failure to notify was the result of a violation of the appropriate legal standard of care. Failure to provide notice is presumed to be actual malice pursuant to the provisions of 27-1-221. [Sections 1 through 10] do not limit the common-law rights of parents.

(3) A person who coerces a minor to have an abortion is guilty of a misdemeanor and upon conviction shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both. On a second or subsequent conviction, the person shall be fined an amount not less than $500 and not more than $50,000 and be imprisoned in the state prison for a term not less than 10 days and not more than 5 years, or both.

(4) A person not authorized to receive notice under [section 5] who signs a notice of waiver as provided in [section 6(2)] is guilty of a misdemeanor.

Section 11. Section 41-1-405, MCA, is amended to read:

"**41-1-405. Emergencies and special situations.** (1) ~~Any~~ A health professional may render or attempt to render emergency service or first aid, medical, surgical, dental, or psychiatric treatment, without compensation, to any injured person or any person regardless of age who is in need of immediate health care when, in good faith, the professional believes that the giving of aid is the only alternative to probable death or serious physical or mental damage.

(2) ~~Any~~ A health professional may render non-emergency services to minors for conditions ~~which~~ that will endanger the health or life of the minor if services would be delayed by obtaining consent from spouse, parent, parents, or legal guardian.

(3) ~~No consent shall~~ Consent may not be required of ~~any~~ a minor who does not possess the mental capacity or who has a physical disability ~~which~~ that renders ~~him~~ the minor incapable of giving ~~his~~ consent and who has no known relatives or legal guardians, if a physician determines that the health service should be given.

(4) Self-consent of minors ~~shall~~ does not apply to sterilization or abortion, except as provided in [sections 1 through 10]."

~~NEW SECTION. Section 12. Right of intervention. Pursuant to Rule 24(a), Montana Rules of Civil Procedure,~~

~~a legislator has the right to intervene in any case in which the constitutionality of Title 50, chapter 20, is challenged.~~

NEW SECTION. **SECTION 12. RIGHT OF INTERVENTION.** PURSUANT TO RULE 24(A), MONTANA RULES OF CIVIL PROCEDURE, A LEGISLATOR HAS THE RIGHT TO INTERVENE IN ANY CASE IN WHICH THE LEGALITY OF TITLE 50, CHAPTER 20, IS CHALLENGED.

NEW SECTION. **Section 13. Repealer.** Section 50-20-107, MCA, is repealed.

NEW SECTION. **Section 14. Codification instruction.** [Sections 1 through 10] are intended to be codified as an integral part of Title 50, chapter 20, and the provisions of Title 50, chapter 20, apply to [sections 1 through 10].

NEW SECTION. **Section 15. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

- END -

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUSAN WICKLUND, M.D.; JAMES H. ARMSTRONG, M.D.; LINDSAY RICHARDS, M.D., SUSAN CAHILL, P.A.; DOUGLAS WEBBER, M.D.; BETH E. THOMPSON, M.D.; MARY STRANAHAN, D.O; and MARK MILES, M.D., on behalf of themselves and their patients throughout Montana, and surrounding states and Canada, Plaintiff-Appellees, v. MICHAEL SALVAGNI, Defendant-Appellant.	No. 95-36028 D.C. No. 93-92-BU-JFB **ORDER** (Filed Oct. 24, 1996)

Before: REAVLEY,* REINHARDT, WIGGINS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Wiggins have voted to reject the suggestion for rehearing en banc and Judge Reavley so recommends.

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* Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

UNITED STATES DISTRICT COURT

DISTRICT OF *MONTANA – Butte Division*

SUSAN WICKLUND, M.D., et al

Plaintiffs

V.

MICHAEL SALVAGNI, In his indiv. capacity and in his official capacity as Gallatin County Attorney,

Defendant

JUDGMENT IN A CIVIL CASE

CASE NUMBER: *CV 93-92-BU-JFB*

[ ] **Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.**

[xx] **Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.**

IT IS ORDERED AND ADJUDGED

THAT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IS GRANTED AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS DENIED. SECTIONS 1 THROUGH 10 OF MONTANA HB 482 ARE HEREBY DECLARED UNCONSTITUTIONAL, AND DEFENDANT IS PERMANENTLY ENJOINED FROM ENFORCING THOSE SECTIONS. FURTHER ORDERED THAT THE REPRESENTATIVE ARNOTT'S RENEWED MOTION TO INTERVENE IS DENIED.

(copy of Memorandum, Opinion & ORDER of Judge Battin is attached)

SEP 27 1995 /s/ LOU ALEKSICH, JR.
Date (COURT SEAL) *Clerk*

/s/ Susan L. Nyho
(By) Deputy Clerk

Eugene GLICK, M.D., and Planned Parenthood of Washoe County,
Plaintiffs-Appellees,

v.

Brian MCKAY, Attorney General of the State of Nevada, et al., Defendants-Appellants.

No. 85-2335.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 13, 1986.
Submission Vacated April 15, 1986.

Resubmitted June 19, 1986.

Submission Vacated March 9, 1987.

Resubmitted June 20, 1991.

Decided June 21, 1991.

Ellen F. Whittemore, Deputy Atty. Gen., Las Vegas, Nev., for defendants-appellants.

Stanley H. Brown, Jr., Stanley H. Brown, Chartered, Reno, Nev., for plaintiffs-appellees.

Appeal from the United States District Court for the District of Nevada.

Before GOODWIN and BRUNETTI, Circuit Judges, and STOTLER*, District Judge.

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* Honorable Alicemarie H. Stotler, United States District Judge for the Central District of California, sitting by designation.

BRUNETTI, Circuit Judge:

Plaintiffs-appellees Dr. Eugene Glick, a physician, and Planned Parenthood of Washoe County, a non-profit family planning clinic, challenged the constitutionality of Nevada Revised Statute (NRS) 442.253(1)(c), which requires that an attending physician performing an abortion explain the physical and emotional implications of having an abortion to the woman; NRS 442.255, which requires parental notification or court authorization before a physician may perform an abortion upon an unemancipated minor; NRS 442.2555, which provides an appeal procedure when such court authorization has been denied; and NRS 442.257, which provides for criminal penalties for the violation of NRS 442.253(1)(c) and NRS 442.255. Appellees sought declaratory and injunctive relief pursuant to the Constitution and 42 U.S.C. § 1983. Defendants-appellants are the Attorney General of the State of Nevada and Nevada's seventeen District Attorneys, the state and local officials charged with enforcing the challenged statute.

On motion for preliminary injunction, the district court held that the explanation requirement was constitutional, but that the parental notification requirement (NRS 442.255), the appeal procedure (NRS 442.2555), and the criminal penalty provision (NRS 442.257) would be preliminarily enjoined. *Glick v. McKay*, 616 F.Supp. 322 (D.Nev.1985). Defendants appeal the court's preliminary injunction order. After briefing and argument, we withheld judgment pending the decision of the United States Supreme Court in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), *Hartigan v. Zbaraz*, 484 U.S. 171, 108 S.Ct. 479, 98 L.Ed.2d 478 (1987), *Hodgson v. Minnesota*, ___ U.S. ___, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), and *Ohio v. Akron Center for Reproductive Health*, ___ U.S. ___, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) (*Akron II*), which had been accepted for review. We now affirm.

I.

A district court's order regarding preliminary injunctive relief is subject to limited review. The grant of a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Religious Technology Center, Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1309 (9th Cir.1989). However, the interpretation of a statute is a question of law that we review de novo. *See, e.g., IMEL v. Laborer's Pension Trust Fund for No. Calif.*, 904 F.2d 1327, 1330 (9th Cir.1990). This is true, as well, for questions of law underlying the issuance of a preliminary injunction. *Guam Fresh, Inc. v. A.D.A.*, 849 F.2d 436, 437 (9th Cir.1988). Accordingly, although this appeal arises from a ruling on a motion for a preliminary injunction, important constitutional issues are at stake and the customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law. *See Thornburgh*, 476 U.S. at 757, 106 S.Ct. at 2177 ("if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction").

II.

Appellants first argue that because the Nevada parental notification requirement does not permit parents to veto their minor daughter's decision to have an abortion, unlike a consent requirement, the threat of an absolute veto is arguably absent. Therefore, they contend that a judicial or other procedure for bypassing the parental notification requirement is not constitutionally required.

In *Akron II* the Supreme Court specifically left this question open, as it found that the Ohio parental notification statute at issue satisfied the requirements identified for parental consent statutes in *Planned Parenthood Association of Central Missouri v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality opinion), *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983), and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (*Akron I*). *See Akron II*, 110 S.Ct. at 2979. Though we hold *infra* that the Nevada statute does not similarly satisfy the requirements for a parental consent statute, we need not address whether such a judicial or other bypass procedure is constitutionally required.

Appellees attack only the adequacy of the judicial bypass, not the lack of it. Because the Nevada parental notification statute contains a bypass procedure, we must address the constitutional adequacy of the procedure, but we are constrained from addressing the constitutional necessity of such a procedure.

III.

The Nevada parental notification statute specifically provides a bypass procedure. *See* NRS 442.255 and 442.2555. Appellants argue that this procedure is constitutionally sufficient.

In *Akron II* the Supreme Court held that a bypass procedure that would suffice as a consent statute will suffice as a notice statute. *Akron II*, 110 S.Ct. at 2979. The Court found that the Ohio parental notification statute at issue was constitutional, as it satisfied the four consent statute criteria established in *Bellotti*. *Id.* at 2979-81. We first consider whether the Nevada bypass procedure satisfies the *Bellotti* criteria.

The four *Bellotti* criteria applied in *Akron II* are:

1. The procedure must allow the minor to show that she possesses the maturity and information to make her abortion decision, in consultation with her physician, without regard to her parents' wishes;

2. the procedure must allow the minor to show that, even if she cannot make the abortion decision by herself, the desired abortion would be in her best interests;

3. the procedure must ensure the minor's anonymity; and

4. the courts must conduct a bypass procedure with expediency to allow the minor an effective opportunity to obtain the abortion.

Id. 110 S.Ct. at 2979-80 (citing *Bellotti*, 443 U.S. at 643-44, 99 S.Ct. at 3048).

A.

The Nevada parental notification statute[1] provides a multi-tiered judicial bypass procedure. The minor must originally request a state district court to issue an order authorizing the abortion. NRS 442.255(2). The court then must interview the minor within two judicial days. *Id.*[2] If the court determines at the interview, from any information provided by the minor and any other evidence that the court may require, that either (1) the minor is mature enough to make an intelligent and informed decision concerning the abortion, (2) the minor is emancipated, or (3) parental notification would be detrimental to her best interests, the court must issue an order within one judicial day following the interview authorizing a physician to perform the abortion. *Id.* If the court does not find sufficient grounds to justify authorization, it must issue an order denying authorization within one judicial day

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[1] NRS 442.255 and 442.2555 are reproduced in the appendix following this opinion.

[2] Appellees argue that the statute is constitutionally deficient because it fails to set forth a specific procedure for a minor to arrange a judicial interview. Such a specific procedure is not constitutionally required. Under *Akron II*, a minor must be afforded only the *opportunity* to prove her case: "Even on the assumption that the . . . pleading scheme could produce some initial confusion . . . the simple and straightforward procedure does not deprive the minor of an opportunity to prove her case." *Akron II*, 110 S.Ct. at 2982 (discussing Ohio's formalized pleading requirements). The Nevada bypass procedure provides such an opportunity to a minor, both at the judicial interview and at the petition hearing. *See* NRS 442.255(2), 442.2555(3).

after the interview; if no order is issued within one judicial day, authorization is deemed granted. NRS 442.255(3).[3] Throughout these proceedings, the court must take the necessary steps to ensure confidentiality. NRS 442.255(4).

If the district court denies authorization pursuant to NRS 442.255(3), the minor, with appointed counsel if necessary, may file a petition in the state district court for a hearing. NRS 442.2555(1). The petition must set forth the minor's initials, her age, the elapsed number of weeks since probable conception, and whether maturity, emancipation, notification detrimental to the minor's best interests, or a combination thereof is relied upon in requesting authorization. NRS 442.2555(2). The court must hold a hearing on the merits of the petition within five judicial days after its filing. NRS 442.2555(3). At the hearing, the court will hear evidence relating to the minor's emotional development, maturity, intellect, understanding, degree of financial independence and emancipation from parental authority, best interests relative to parental involvement in the decision whether to have an abortion, and any other evidence the court finds useful. *Id.* The court

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[3] Appellees challenge this "constructive authorization" provision. However, in *Akron II* the Supreme Court specifically ruled that such a provision did not violate the Constitution: "Absent a demonstrated pattern of abuse or defiance, a State may expect that its judges will follow mandated procedural requirements. . . . With an abundance of caution, and concern for the minor's interests, [the state] added the constructive authorization provision . . . to ensure expedition of the bypass procedures even if those time limits are not met." *Akron II*, 110 S.Ct. at 2981.

then enters a decree either granting the petition to authorize a physician to perform an abortion without parental notification, or denying the petition, setting forth the grounds for denial. NRS 442.2555(4). The statute imposes no deadline for issuing this decree. Throughout these proceedings the court must take necessary steps to ensure confidentiality. NRS 442.255(4).

Finally, if the petition is denied, the minor may appeal the denial to the Nevada Supreme Court. NRS 442.2555(5). The notice of intent to appeal must be made within one judicial day and the record on appeal must be perfected within five judicial days after the filing of the notice. *Id.* The statute requires that the Nevada Supreme Court, by rule or order, provide for a confidential and expedited review of the case. *Id.* On April 30, 1991, the Nevada Supreme Court filed an order which states:

> Pursuant to the legislative directive set forth in NRS 442.2555(5); IT IS HEREBY ORDERED that any appeals taken pursuant to NRS 442.2555(5) shall be confidential and submitted to the court for expedited review.

B.

1.

A judicial bypass procedure first must allow the minor "to show that she possesses the maturity and information to make the abortion decision, in consultation with her physician, without regard to her parents' wishes." *Akron II*, 110 S.Ct. at 2979 (citing *Bellotti*, 443 U.S. at 643, 99 S.Ct. at 3048). In *Akron II* the Court held that the Ohio parental notification statute satisfied this criterion,

as it specifically permitted the minor to show that she " 'is sufficiently mature and well enough informed to decide intelligently whether to have an abortion.' " *Id.* (quoting Ohio Rev. Code Ann. § 2151.85(C)(1) (Supp.1988)).

The Nevada bypass procedure, both at the initial judicial interview and at the petition hearing, also specifically allows the minor to show her maturity and informed status. *See* NRS 442.255(2)(a) (at the interview, if, from information provided by minor, the court determines that "[s]he is mature enough to make an intelligent and informed decision concerning the abortion," the court shall authorize a physician to perform the abortion); NRS 442.2555(3)(a) (at the hearing the court shall hear evidence relating to "[t]he minor's emotional development, maturity, intellect and understanding"). Under *Akron II*, the Nevada statute meets the first *Bellotti* criterion.

2.

Second, a bypass procedure must allow the minor to show that even if she cannot make the decision herself, the desired abortion would be in her best interests. *Akron II*, 110 S.Ct. at 2979 (citing *Bellotti*, 443 U.S. at 644, 99 S.Ct. at 3048). In *Akron II* the Court held that the Ohio statute satisfied this criterion, as it specifically required the court "to authorize the minor's consent where the court determines that the abortion is in the minor's best interest and in cases where the minor has shown a pattern of physical, sexual or emotional abuse." *Id.* (citing Ohio Rev. Code Ann. § 2151.85(C)(2) (Supp.1988)).

The Nevada bypass procedure, both at the initial judicial interview and at the petition hearing, allows the minor to show that *parental notification* would not be in her best interests, and requires the court to authorize the abortion in such instances. *See* NRS 442.255(2)(c) (at the interview, if, from information provided by minor, "[t]he *[parental] notice* required by subsection 1 would be detrimental to her best interests," the court shall authorize a physician to perform the abortion) (emphasis added); NRS 442.2555(3)(c) (at the hearing the court shall hear evidence relating to "[t]he minor's best interest *relative to parental involvement* in the decision whether to undergo an abortion") (emphasis added).

The language of these provisions does not meet the requirement of *Bellotti*. Rather than requiring the reviewing court to consider the minor's "best interests" generally, the Nevada statute requires the consideration of "best interests" only with respect to the possible consequences of parental notification. The best interests of a minor female in obtaining an abortion may encompass far more than her interests in not notifying a parent of the abortion decision. Furthermore, in *Bellotti*, the court expressly stated, "[i]f, *all things considered*, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement." *Bellotti*, 443 U.S. at 648, 99 S.Ct. at 3050 (emphasis added). Therefore, the Nevada statute impermissibly narrows the Bellotti "best interests" criterion, and is unconstitutional.

3.

Third, the bypass procedure must ensure the minor's anonymity. *Akron II*, 110 S.Ct. at 2979 (citing *Bellotti*, 443 U.S. at 644, 99 S.Ct. at 3048). In *Akron II* the Court held that the Ohio statute satisfied this criterion.

> Section 2151.85(D) provides that "[t]he [juvenile] court shall not notify the parents, guardian, or custodian of the complainant that she is pregnant or that she wants to have an abortion." Section 2151.85(F) further states: "Each hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section shall be kept confidential and are not public records." Section 2505.073(B), in a similar fashion, requires the court of appeals to preserve the minor's anonymity and confidentiality of all papers on appeal. The State, in addition, makes it a criminal offense for an employee to disclose documents not designated as public records.

110 S.Ct. at 2979.

Neither complete anonymity nor any specific procedure for ensuring confidentiality is required.

> Confidentiality differs from anonymity, but we do not believe that the distinction has constitutional significance in the present context. The distinction has not played a part in our previous decisions, and, even if the *Bellotti* plurality is taken as setting the standard, we do not find complete anonymity critical. [The Ohio statute], like the statutes in *Bellotti* and *Ashcroft*, takes

> reasonable steps to prevent the public from learning of the minor's identity.

Id. at 2980.

The Nevada bypass procedure, at the initial judicial interview and the state district court petition hearing, sufficiently ensures the minor's confidentiality. *See* NRS 442.255(4) ("The court shall take the necessary steps to ensure the interview and any other proceedings held pursuant to this subsection or NRS 442.2555 are confidential. The rules of civil procedure do not apply to any action taken pursuant to this subsection.").

Nevada's provision of "necessary steps" meets the "reasonable steps" standard of *Akron II*. The provision making the rules of civil procedure inapplicable in such proceedings will adequately protect the anonymity and confidentiality of pregnant minors. Following the lead of the Supreme Court, we refuse to base our decision on the facial validity of this provision requiring the courts to provide confidentiality on the mere possibility that the courts may illegally fail to do so. *Akron II*, 110 S.Ct. at 2980. NRS 442.255(4) meets the *Bellotti* confidentiality prong.

Appellees argue that the statute is not constitutionally sufficient because it requires the use of the minor's initials on the petition. *See* NRS 442.2555(2). The Supreme Court held in Ashcroft that the judicial bypass in question there assured the confidentiality of a female minor, despite requiring that the minor "file a petition setting forth [her] initials." 462 U.S. at 479 n. 4, 491 n. 16, 103 S.Ct. at 2519 n. 4, 2525 n. 16. Therefore, the Nevada

statute meets the *Bellotti* confidentiality requirement as to NRS 442.2555(2).

The Nevada Supreme Court's April 30, 1991, order provides that "any appeals taken pursuant to NRS 442.2555(5) shall be confidential." In *Akron II*, the court upheld the confidentiality provision of an Ohio statute which provided as follows:

> All proceedings [on appeal] shall be conducted in a manner that will preserve the anonymity of the appellant on appeal. All papers and records that pertain to an appeal under this section shall be confidential and not public records. . . .

The Nevada Supreme Court's order, like NRS 442.255(4), meets the *Akron II* "reasonable steps" requirement. We believe that the court's order, now implemented, will be followed and enforced. Therefore, we hold that NRS 442.2555(5), as implemented by Supreme Court order, meets the constitutional confidentiality requirements of *Bellotti*.

4.

Fourth, the bypass procedure must be conducted with expediency. *Akron II*, 110 S.Ct. at 2980 (citing *Bellotti*, 443 U.S. at 644, 99 S.Ct. at 3048). In *Akron II* the Ohio statute specifically required that the trial court rule within five business days of the filing of the complaint, that the court of appeals docket an appeal within four days after the filing of a notice of appeal, and that the court of appeals render a decision within five days after docketing. *Id.* (citing Ohio Rev.Code Ann. §§ 2151.85(B)(1), 2505.073(A) (Supp.1988)). The court held

that the Ohio statute satisfied the expediency criterion, dismissing the argument that, under the provisions relating to the court of appeals, days referred to "business days" and thus the procedure could, in a worst-case analysis, take up to twenty-two calendar days. *Id.* at 2980-81.

The Nevada bypass procedure also specifically provides short time periods to ensure that the procedure is conducted with expediency at almost every level of the bypass procedure. *See* NRS 442.255(2) (court must interview minor within two judicial days of request); NRS 442.255(2), NRS 442.255(3) (court must issue order granting or denying authorization within one judicial day of interview; if order not issued, authorization deemed granted); NRS 442.2555(3) (court must hold hearing on merits of petition within five judicial days of filing). However, the statute does not contain *any* time period within which the state district court must rule upon a minor's petition under NRS 442.2555.

Appellants argue that the Nevada statute is similar to the Missouri statute that was upheld as constitutional in *Ashcroft*. Appellants fail, however, to support their argument with evidence that the Missouri statute did not impose a time constraint on the district court's review of a minor's petition. In fact, the only mention of expediency in *Ashcroft* comes in the context of discussing the conditions and requirements of appellate review. The Nevada statute does not require the state district court to conduct its review of a minor's petition with expediency. In contrast to the interview and authorization procedure provided in NRS 442.255, the review procedure in NRS 442.2555 places no time limit on the period during which

the district court may review the minor's petition, and the petition cannot be deemed granted if the district court fails to act within a given time period. Under the statute the district court could thus delay the bypass procedure indefinitely.[4] The district court review procedure does not meet the *Bellotti* expediency criterion.

Appellees argue that the statute is also constitutionally deficient because the bypass procedure does not require the Nevada Supreme Court to hear or rule on appeals within specific time periods, instead providing that "[t]he court shall, by court order or rule, provide for . . . expedited appellate review of cases appealed under this section." *See* NRS 442.2555(5).

Ashcroft applies to this provision, as it expressly requires expedited appellate review. 462 U.S. at 491 n. 16, 103 S.Ct. at 2525 n. 16. The Nevada statute's appellate

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[4] We acknowledge that the Supreme Court in *Akron II* did caution against invalidating a notification statute on a facial challenge based upon a worst-case analysis that may never occur. *See Akron II*, 110 S.Ct. at 2981. However, in *Akron II* the Court was considering a bypass procedure with a maximum time of twenty-two days, which the Court compared favorably with the seventeen-day period it upheld in *Ashcroft*, 462 U.S. at 477, n. 4, 491 n. 16, 103 S.Ct. at 2519, n. 4, 2525 n. 16. *See Akron II*, 110 S.Ct. at 2981.

While a seventeen or twenty-two day bypass procedure period satisfies the *Bellotti* requirement that the courts must conduct a bypass procedure with expediency to allow the minor an effective opportunity to obtain an abortion, an indefinite period does not. *See Akron II*, 110 S.Ct. at 2980; *Bellotti*, 443 U.S. at 644, 99 S.Ct. at 3048.

review procedure "provides the framework for a constitutionally sufficient means of expediting judicial proceedings. . . . There is no reason to believe that [the state] will not expedite any appeal consistent with the mandate in our prior opinions." *Id.* Further, the Nevada Supreme Court's order which requires that appeals be "submitted to the court for expedited resolution" sufficiently ensures that expediency in the appeals procedure will be guaranteed to pregnant minors. Therefore, the Nevada Supreme Court expediency procedure is constitutionally sufficient.

However, because the Nevada statute does not require that the district court conduct its petition review with expediency to allow a minor an effective opportunity to obtain an abortion, we hold that the Nevada statute does not constitutionally satisfy the fourth *Bellotti* criterion and therefore does not suffice for a consent statute. *See Bellotti*, 443 U.S. at 644, 99 S.Ct. at 3048, *Akron II*, 110 S.Ct. at 2980.

C.

As noted *supra* at 5, the Court in *Akron II* found that because of "the greater intrusiveness of consent statutes . . . a bypass procedure that will suffice for a consent statute will suffice for a notice statute." *See Akron II*, 110 S.Ct. at 2979. Because we hold that the Nevada bypass procedure does not meet the constitutional requirements of a consent statute, we must consider whether it meets the requirements of the less intrusive notification statute. *See generally, H.L. v. Matheson*, 450 U.S. 398, n. 17, 411, 101 S.Ct. 1164, 1172 n. 17, 67 L.Ed.2d 388 (1981) ("we

expressly declined to equate notice requirements with consent requirements").

The Supreme Court has repeatedly espoused the importance of expediency in the abortion context. *See Akron II*, 110 S.Ct. at 2980-81; *Bellotti*, 443 U.S. at 644, 99 S.Ct. at 3048. Delaying a woman's opportunity to undergo an abortion can create two serious problems. First, the health risks associated with an abortion increase significantly with delay. *See Matheson*, 450 U.S. at 439 & n. 25, 101 S.Ct. at 1173 & n. 25.

Further, under *Roe v. Wade*, every woman has a fundamental constitutional right to seek an abortion. 410 U.S. 113, 147-64, 93 S.Ct. 705, 724-32, 35 L.Ed.2d 147 (1973). That fundamental right, however, gradually yields to the state's interest in potential human life as fetal viability nears. *See Webster v. Reproductive Health Servs.*, 492 U.S. 490, 109 S.Ct. 3040, 3057, 106 L.Ed.2d 410 (1989). Therefore, if the abortion decision is hindered or burdened during the earlier stages of pregnancy, the performance of an abortion may be delayed until such time as the state can more extensively regulate the exercise of a woman's constitutional right. *See* NRS 442.250 (providing that all abortions performed after the twenty-fourth week of pregnancy must be performed in a hospital, by a licensed physician, and may only be performed "if the physician has reasonable cause to believe that an abortion currently is necessary to preserve the life or health of the pregnant woman").

There are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

> Yet an abortion may not be the best choice for the minor. The circumstances in which the issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for adoption, or assuming the responsibility of motherhood with the assumed support of the family, may be feasible and relevant to the minor's best interest. Nonetheless, the abortion decision is one that *simply cannot be postponed*, or it will be made by default with far reaching consequences.

Bellotti, 443 U.S. at 642-43, 99 S.Ct. at 3048 (emphasis added).

Because time is such a critical factor, relating both to a woman's health and the exercise of her constitutional right to an abortion, we conclude that the Nevada bypass procedure, which does not contain a time period within which the state district court must rule on a minor's NRS 442.2555 petition and thus may delay her right to implement the bypass procedure, possibly indefinitely, does not sufficiently protect a pregnant minor's constitutional right to an abortion. That Nevada has impermissibly constricted the meaning of "best interests" only adds to the infirmity.

IV.

We hold that a bypass procedure within a parental notification statute must meet constitutional scrutiny. Because we find that the Nevada bypass procedure fails to meet the requirements for a consent statute bypass, and also does not meet the expediency requirement for a notice statute bypass, we hold that the district court

properly enjoined NRS 442.255, NRS 442.2555, and NRS 442.257.

As the prevailing party on appeal, appellees are awarded attorney's fees and costs pursuant to 42 U.S.C. § 1988.

AFFIRMED.

APPENDIX

> § 442.255 Notice to custodial parent or guardian; request for authorization for abortion; rules of civil procedure inapplicable.
>
> 1. Unless in the judgment of the attending physician an abortion is immediately necessary to preserve the patient's life or health or an abortion is authorized pursuant to subsection 2, or [NRS 442.2555], a physician shall not knowingly perform or induce an abortion upon an unmarried and unemancipated woman who is under the age of 18 years unless a custodial parent or guardian of the woman is personally notified before the abortion. If the custodial parent or guardian cannot be so notified after a reasonable effort, the physician shall delay performing the abortion until he has notified the parent or guardian by certified mail at his last known address.
>
> 2. An unmarried or unemancipated woman who is under the age of 18 years may request a district court to issue an order authorizing an abortion. If so requested, the court shall interview the woman at the earliest practicable time, which must be not more than 2 judicial days after the request is made. If the court determines, from

any information provided by the woman and any other evidence that the court may require, that:

(a) She is mature enough to make an intelligent and informed decision concerning the abortion;

(b) She is financially independent or is emancipated; or

(c) The notice required by subsection 1 would be detrimental to her best interests,

the court shall issue an order within 1 judicial day after the interview authorizing a physician to perform the abortion. . . .

3. If the court does not find sufficient grounds to authorize a physician to perform the abortion, it shall enter an order to that effect within 1 judicial day after the interview. If the court does not enter an order either authorizing or denying the performance of the abortion within 1 judicial day after the interview, authorization shall be deemed to have been granted.

4. The court shall take the necessary steps to ensure that the interview and any other proceedings held pursuant to this subsection or NRS 442.2555 are confidential. The rules of civil procedure do not apply to any action taken pursuant to this subsection.

§ 442.2555 Procedure if district court denies request for authorization for abortion: Petition; hearing on merits; appeal.

1. If the order is denied pursuant to NRS 442.255, the court shall, upon request by the minor if it appears that she is unable to employ counsel, appoint an attorney

to represent her in the preparation of a petition, a hearing on the merits of the petition, and on an appeal, if necessary. The compensation and expenses of the attorney are a charge against the county, as provided in the following schedule:

(a) For consultation, research and other time reasonably spent on the matter, except court appearances, $20 per hour.

(b) For court appearances, $30 per hour.

2. The petition must set forth the initials of the minor, the age of the minor, the estimated number of weeks elapsed from the probable time of conception, and whether maturity, emancipation, notification detrimental to the minor's best interests or a combination thereof are relied upon in avoidance of the notification required by NRS 442.255. The petition must be initialed by the minor.

3. A hearing on the merits of the petition, on the record, must be held as soon as possible and within 5 judicial days after the filing of the petition. At the hearing the court shall hear evidence relating to:

(a) The minor's emotional development, maturity, intellect and understanding;

(b) The minor's degree of financial independence and degree of emancipation from parental authority;

(c) The minor's best interests relative to parental involvement in the decision whether to undergo an abortion; and

(d) Any other evidence that the court may find useful in determining whether the minor is entitled to avoid parental notification.

4. In the decree, the court shall, for good cause:

(a) Grant the petition, and give judicial authorization to permit a physician to perform an abortion without the notification required in NRS 442.255; or

(b) Deny the petition, setting forth the grounds on which the petition is denied.

5. An appeal from an order issued under subsection 4 may be taken to the supreme court, which shall suspend the Nevada Rules of Appellate Procedure pursuant to N.R.A.P. 2 to provide for an expedited appeal. The notice of intent to appeal must be given within 1 judicial day after the issuance of the order. The record on appeal must be perfected within 5 judicial days after the filing of the notice of appeal and transmitted to the supreme court. The court shall, by court order or rule, provide for a confidential and expedited appellate review of cases appealed under this section.

No. 96-858

Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHAEL SALVAGNI, in his official capacity as Gallatin County Attorney,

Petitioner,

—v.—

SUSAN WICKLUND, M.D.; JAMES H. ARMSTRONG, M.D.; LINDSAY RICHARDS, M.D.; SUSAN CAHILL, P.A.; DOUGLAS WEBBER, M.D.; BETH E. THOMPSON, M.D.; MARY STRANAHAN, D.O.; and MARK MILES, M.D., on behalf of themselves and their patients throughout Montana, the surrounding states and Canada,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a statute requiring parental notification for a minor seeking an abortion is invalid if its judicial bypass mechanism does not allow an immature minor to obtain a waiver of parental notification even if the abortion is in her best interests, but only allows such a waiver in the more limited circumstances where parental notification is not in her best interests?

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Respondents Susan Wicklund, M.D., *et al.*, respectfully submit the following brief in opposition to the petition for certiorari filed by Michael Salvagni, the County Attorney for Gallatin County, Montana (hereinafter "petitioner" or "the State"), docketed on November 29, 1996.

COUNTERSTATEMENT OF THE CASE

This case was filed in November of 1993 after a police officer threatened respondent Wicklund with prosecution under the then-existing Montana parental notification law, enacted in 1974, Mont. Code Ann. § 50-20-107(b) (1993) (hereinafter "the 1974 statute"), and after Wicklund was served with a state court subpoena obtained by the office of petitioner Salvagni commanding her to produce the medical records regarding medical procedures and counseling performed at her office on July 21, 1993, the date when one minor purportedly obtained an abortion at her office. The 1974 statute contained no mechanism by which minors could bypass the parental notification requirement. The federal district court granted a temporary restraining order against the 1974 statute on November 30, 1993, and the subpoena was subsequently quashed by the state district court.

In December of 1993, petitioner Salvagni, represented by the Attorney General of Montana, entered into a stipulation for judgment that states that the Montana parental notification law is unenforceable under the decisions of this Court. On December 21, 1993, the district court entered a permanent injunction against enforcement of the 1974 statute based on the stipulation of the parties.

In 1995, the Montana legislature repealed the 1974 statute, and enacted a new parental involvement statute (hereinafter "HB 482" or "the Montana statute").

Respondents filed a supplemental complaint challenging the constitutionality of HB 482 in July of 1995.

Under HB 482, an unemancipated minor who wishes to avoid notice to a parent of an abortion must petition the Montana youth court for a waiver of notice. HB 482 requires the youth court to authorize the minor "to consent to the performance or inducement of an abortion without the notification of a parent or guardian," *see* Pet. 3,[1] in three circumstances:

(1) if the court finds by clear and convincing evidence that the minor is sufficiently mature to decide whether to have an abortion;

(2) if the court finds by clear and convincing evidence that there is evidence of a pattern of physical, sexual, or emotional abuse of the minor by one or both parents, a guardian, or a custodian; and

(3) if the court finds by clear and convincing evidence that "the notification of a parent or guardian is not in the best interests of the petitioner." *See* Pet. 3 (quoting statute).

In their supplemental complaint, respondents challenged, *inter alia*, the adequacy of this bypass procedure. First, respondents argued that a minor will be unable to avoid parental notification even if she is mature or an abortion is in her best interests. Under the Montana Youth Court Act, after a petition is filed in the youth court, a "summons must be served directly to: (a) the youth; (b)

[1]Citations to the text of the petition for writ of certiorari are in the form "Pet. __"; citations to the appendix to the petition are in the form "__a."

his parent or parents having actual custody of the youth or his guardian or custodian, as the case may be; *and* (c) other persons as the court may direct." Mont. Code Ann. § 41-5-502(1) (emphasis added). Thus, at the outset, the minor's parents will receive notice of the proceeding purportedly designed to allow her to waive notice.

Second, respondents argued that an abused minor will be unable to avoid parental notification, even if she is mature or an abortion is in her best interests, because a finding of a pattern of "physical, sexual, or emotional abuse" by the youth court must be reported pursuant to Mont. Code Ann. § 41-3-202, and such a report will sometimes result in an investigation at the minor's home, thus effectively notifying the parents of the minor.

Third, respondents argued that, as to immature minors, the grounds for a waiver of parental notification are too narrow. Instead of requiring the youth court to authorize the minor "to consent to the performance or inducement of an abortion without the notification of a parent or guardian" if an *abortion is in her best interests*, it authorizes the abortion only in the narrower circumstances where *parental notification is not in her best interests*. This difference had been condemned by the court of appeals in which Montana is situated in *Glick v. McKay*, 937 F.2d 434, 438-39 (9th Cir. 1991), four years before the Montana legislature enacted HB 482.

The district court reached only the third of these challenges to the adequacy of HB 482's judicial bypass mechanism. It held that the bypass mechanism of a parental notification statute must satisfy the same criteria as a parental consent statute, as laid out in *Bellotti v. Baird*, 443 U.S. 622 (1979), and that HB 482 failed to comply with the best interests criterion set out in *Bellotti* for

immature minors. Thus, the district court permanently enjoined HB 482.

On appeal, the court below held that it was bound by the holding in *Glick*, and accordingly affirmed the district court's decision. Petitioner's suggestion for rehearing en banc -- a request that the court of appeals overrule *Glick* -- was denied with no active judge requesting a vote on whether to rehear en banc. *See* 34a.

REASONS FOR DENYING THE WRIT

In seeking review by this Court, the State has failed to establish any of the factors that weigh in favor of a grant of certiorari. On the contrary, the decision of the court below is in conflict neither with the decisions of this Court nor with the decisions of other United States courts of appeals. Further, no important question of federal law is raised by this case "that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c), because strong alternative grounds support the result reached by the court of appeals. Accordingly, the petition should be denied.

I. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISIONS AND WITH THE REASONING UNDERLYING THEM.

The State argues that this Court should grant its petition because the decision of the court of appeals is "incompatible" with this Court's decisions in *Bellotti v. Baird*, 443 U.S. 622 (1979), *Hodgson v. Minnesota*, 497 U.S. 417 (1990), and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (*Akron II*). Contrary to the State's argument, however, nothing in the

holdings in these cases is inconsistent with the decision of the court of appeals.

A. No Decision Of This Court Has Held That A Parental Notification Statute May Use A Different Standard For Bypassing Parental Involvement Than Is Required For A Parental Consent Statute.

In *Bellotti*, the plurality opinion of Justice Powell outlined the bypass procedure that a State must establish in connection with a parental consent statute for abortion. In relevant part, the plurality opinion stated:

> If, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization *without any parental involvement*.

Id., 443 U.S. at 648 (emphasis added). Thus, under a consent statute, such a minor has a right to obtain court authorization for the abortion "without first consulting or notifying her parents," *id.* at 647, even if *parental involvement or notification* would be in her best interests. The opinion correctly observed that mere notice of the bypass proceeding might result in "parents' efforts to obstruct both an abortion and access to court." *Id.* That is, even if the minor obtained judicial authorization for the abortion, notification of a parent might result in denial of "an *effective* avenue of relief for some of those who need it most." *Id.* (emphasis added). It is thus entirely consistent with *Bellotti* to require, as did the court below, that a judicial bypass in a parental notification statute must waive parental notification if the *abortion* is in the minor's best interests.

Under *Bellotti*, where a State requires parental consent for abortion, it must allow the minor to obtain a bypass of parental consent without any notice to the parents whatsoever. Indeed, the fact that the Massachusetts statute at issue in *Bellotti* did not allow for a bypass without notice to parents was the chief ground upon which the plurality invalidated the statute. *Id.* at 647. If, in the case of an immature minor, an abortion is in her best interest, the state court inquiry is over, and authorization for the abortion *must* be given.[2]

The State next argues that the decision of the court of appeals is "at odds with" this Court's decisions in *Hodgson* and *Akron II*. *See* Pet. 9. Neither *Hodgson* nor *Akron II*, however, involved a challenge to the judicial bypass standards applicable to immature minors. Thus, the State's argument that the Court in *Hodgson* and *Akron II* held *sub silentio* that the *Bellotti* standards are not required in parental notification statutes is misplaced. Whether this Court was "unaware of the nature of the best interests standard in the Ohio law" or not, *see* Pet. 12, is irrelevant.

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[2]A decision invalidating Louisiana's parental consent statute illustrates this point. In *Causeway Medical Suite v. Ieyoub*, 905 F. Supp. 360 (E.D. La. 1995), *appeal pending*, No. 95-31178 (argued Sept. 5, 1996), the district court held unconstitutional 1995 amendments to Louisiana's statute requiring parental consent for abortion. One of the constitutional flaws identified by the court was that the statute, which included a judicial bypass of parental consent, required "that the juvenile court notify the parents of immature minors who have applied for judicial bypass if it is determined to be in the best interest of the minor to do so." *Id.* at 365. In essence, Louisiana had adopted *both* a parental consent law *and* a parental notification law: to avoid parental consent, the minor must seek a judicial bypass; but, in the bypass proceeding, if the court found the minor immature, her parents would be notified if notification was in her best interests, even if the abortion itself was in her best interests.

A conflict between a decision of this Court and that of a court of appeals is not created because this Court might have been "aware" of a similar provision in another statute.[3] A conflict requires a *holding* of this Court -- or at least some analysis of the question. No opinion of this Court since *Bellotti*, however, has purported to analyze the standard applicable to immature minors seeking authorization for an abortion under a parental notification statute.

Finally, the State argues that a different best interests standard in parental notification statutes "makes practical sense because under a notification statute the minor, not a parent or a court, possesses final decisionmaking power concerning whether an abortion is warranted and because the bypass proceeding's sole purpose is to determine whether waiver of the *notice* requirement is appropriate." Pet. 17. Practically, however, notice to a parent is often tantamount to delegation of a veto power, because mere notice might result in "parents' efforts to obstruct [the] abortion . . . ." *Bellotti*, 443 U.S. at 647. Indeed, this Court's opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), recognized that a spousal notification requirement for abortion "is . . . likely to prevent a significant number of women from obtaining an abortion." *Id.* at 893. It is likewise true that a parental notification requirement, because of the potential for "verbal

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[3]Thus, the State's argument that a conflict exists between this Court's opinions and that of the court below is based on even *less* than its argument that there is a conflict between the decision of the court below and that of another United States court of appeals. As discussed below, the latter argument improperly relies on dicta from another court of appeals to construct a conflict, *see infra* at Point II; here the State relies not even on dicta, but on an unspoken "awareness" of an issue not raised by the parties *or* analyzed by the Court.

harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family or friends," *id.*, is likely to prevent some minors from obtaining abortions, as surely as if the state awarded the parents the power of consent.[4] As this Court wrote in *Casey*, in words equally applicable to parental notification:

> Whether the prospect of notification itself deters such women from seeking abortion, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, *the notice requirement will often be tantamount to the veto found unconstitutional in Danforth.*

505 U.S. at 897 (emphasis added). Thus, it makes *practical* sense to apply the same best interests standard to both consent and notification statutes as the Court below did, because notice often effectively delegates a veto power to a parent. *See Planned Parenthood v. Miller*, 63 F.3d 1452, 1458-60 (8th Cir. 1995) (concluding that parental notification is tantamount to parental consent and requires a

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[4]In addition, minors face physical and sexual abuse. While HB 482 purportedly contains an "exception" for cases in which there is "evidence of a pattern of physical, sexual, or emotional abuse" of the minor, Mont. Code Ann. § 50-20-212(5)(a), HB 482 also requires the youth court to make a report of the abuse pursuant to Mont. Code Ann. § 41-3-202, which may result in an investigation at the minor's home. HB 482, § 9(2)(b). The report and investigation that will ensue will result in constructive notification to the minor's parents. Such constructive notification was condemned by Justice O'Connor's controlling opinion in *Hodgson v. Minnesota*, 497 U.S. 417, 460 (1990) (O'Connor, J., concurring).

similar bypass), *cert. denied*, 116 S. Ct. 1582, 1583 (1996).

B. The Montana Statute's Best Interests Standard For Immature Minors Impermissibly Narrows The Class Of Minors Able To Obtain An Abortion Without Parental Involvement And Is Based On A Misunderstanding Of The Function Of The Bypass.

The best interests standard employed by HB 482 will prevent some minors from obtaining an abortion without parental involvement even though, under the correct *Bellotti* test, they would obtain judicial approval for an abortion. Some immature minors whose best interests may dictate an abortion may be prevented from obtaining the procedure because a court concludes that notification of their parents is in their best interests. As the court of appeals wrote in *Glick v. McKay*, "The best interests of a minor female in obtaining an abortion may encompass far more than her interests in not notifying a parent of the abortion decision." *Id.*, 937 F.2d at 439. Other courts of appeals have, in dicta, recognized the difference between the two standards. *Barnes v. Mississippi*, 992 F.2d 1335, 1341 (5th Cir.) ("parental consent statute using parental notification as the guidepost for the child's best interests might well be unconstitutional"), *cert. denied*, 114 S. Ct. 468 (1993); *Planned Parenthood v. Miller*, 934 F.2d 1462, 1477 n.21 (11th Cir. 1991) (recognizing that the two standards may lead to different results, but suggesting that difference is not "constitutionally significant"). The *Glick* reasoning is sound and consistent with this Court's decisions for three reasons.

First, *Glick* correctly recognizes that the immature minor's best interests in having an abortion include "far more" than her interests in avoiding notice to her parents. For example, factors indicating that an abortion is in the minor's best interests may include the medical problems she may experience during pregnancy and childbirth because of her physical immaturity; other physical and emotional health problems unrelated to her pregnancy; her capacity to be a parent; or the interruption of her education that would be caused by pregnancy, childbirth, and motherhood. *See Bellotti*, 443 U.S. at 642 ("[T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."). These factors have no bearing on whether it is in her best interests to notify or consult her parents, and are therefore irrelevant under HB 482.

Second, the evidentiary burden on the immature minor is significantly higher if she must prove by clear and convincing evidence that parental notification is not in her best interests than if she must prove, by the same standard, that an abortion is in her best interests. By virtue of her immaturity, it appear may at the outset of the youth court hearing that she will benefit from parental consultation. To prove that notification is not in her best interests, an immature minor will have to overcome this presumption. However, the Montana statute forecloses her from presenting the most persuasive evidence that notice is not in her best interests: evidence of physical, sexual or emotional abuse. Because HB 482 requires the youth court to report such information to the appropriate state authorities, such evidence, if presented, may result in a report and a state inquiry at her home. *See* n.4 *supra*. Furthermore, while she may present evidence of a generalized fear of parental retribution or obstruction, such a fear, though well-founded, may not constitute "clear and convincing evidence."

Indeed, an immature minor may have little or no "evidence" that notification is against her best interests.

On the other hand, under the proper *Bellotti* test, the immature minor will generally be better able to show that an abortion is in her best interests, for the presumption is likely that an abortion is in her best interests. Her physical and emotional immaturity itself may be grounds to find that an abortion is in her best interests, as may be her physical and emotional health. The obvious harm to the course of her education, and the consequent harm to her future, are also relatively easy to prove. Of course, specific problems she may have at home if her parents discover she is pregnant also bear on whether the abortion is in her best interests.[5]

Finally, because HB 482 uses the incorrect standard, the determination of whether to authorize an abortion for an immature minor may be made without *any* consideration of whether the procedure is in her best interests.[6] This goes

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[5]By selecting *one* of the factors that a court considers in its *Bellotti* assessment, and elevating it as the *only* factor to be considered, HB 482 necessarily increases the minor's burden of proof. It is axiomatic that removal of one ground for meeting a burden of proof increases that burden. For example, in a custody dispute where the best interests of the child governs, if all factors other than ability to provide financial support are removed from consideration, the burden of proof on a poorer spouse changes decisively, even though, with a more global best interests inquiry, that spouse might prevail. *Cf. Montana v. Egelhoff*, 116 S. Ct. 2013, 2023 (1996) (opinion of Scalia, J., announcing the judgment of the court) ("by excluding a significant line of evidence that might refute *mens rea*, the statute made it easier for the State to meet the requirement of proving *mens rea* beyond a reasonable doubt").

[6]Indeed, if the waiver of notice is granted, the abortion may be performed simply because parental notification was not in her best

(continued...)

against the purpose of the bypass proceeding: the court is to function as a surrogate for a parent, considering, as the parent would, whether the *abortion* is in the minor's interest.[7] HB 482 changes the role of the judicial bypass, so that whether the minor obtains an abortion depends exclusively on her relationship with her parents, and not at

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[6](...continued)
interests, even if, for some reason, the abortion itself may *not* be in her best interests. As this Court recognized in *Bellotti*:

> [A]n abortion may not be the best choice for the minor. The circumstances in which this issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interests.

Id., 443 U.S. at 642-43. Under HB 482, exploration of alternatives to abortion, the support of the father, and numerous other factors that may weigh *against* the abortion being in the minor's best interests, are improperly excluded from consideration.

[7]The State argues that "nothing precludes a notice bypass decisionmaker from considering the appropriateness of the abortion when it determines whether parental notification should occur, any more than a parental consent bypass decisionmaker . . . is foreclosed from concluding that judicial consent to an abortion should not be given until parental consultation has taken place." Pet. at 18 n.5. While it may be argued that nothing *precludes* some consideration of whether the abortion is in the minor's best interests, the Montana statute does not *require* such consideration, and therefore does not serve the function envisioned for the bypass: to serve as an evaluation, in the case of an immature minor, of whether the abortion is in her best interests.

In addition, the State points to Louisiana's new parental consent law as "codif[ying] this aspect of *Bellotti*." Pet. 18 n.5. Far from "codifying" *Bellotti*, the Louisiana statute is *invalid* under *Bellotti* for the very reason the State touts it. *Causeway*, 905 F. Supp. at 365.

all on her need for the procedure. As this Court indicated in *Hodgson*, "[T]he justification for any rule requiring parental involvement in the abortion decision rests *entirely* on the best interests of the child." 497 U.S. at 454 (emphasis added). By shifting emphasis away from the best interests of the child in having the abortion, HB 482 violates the purpose of the bypass procedure.

II. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THAT OF ANY OTHER COURT OF APPEALS.

The State argues that the decision of the court below is in conflict with the decision of the United States Court of Appeals for the Eleventh Circuit in *Planned Parenthood v. Miller*, 934 F.2d 1462 (11th Cir. 1991). The State relies, however, entirely on a footnote in the opinion in *Miller* that is clearly dicta. But "[b]reath spent repeating dicta does not infuse it with life." *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 2149 (1995).

The Georgia parental notification statute at issue in *Miller*, like the Montana statute whose invalidation was affirmed by the court below, provides that an immature minor is entitled to a waiver of parental notification if the state court "finds . . . that notice to her parents would not be in her best interests." *Id.* at 1468 (citing Ga. Code Ann. § 15-11-114(c)(2)).[8] In addressing this aspect of the

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[8]Unlike HB 482, however, the Georgia parental notification law does not require proof "by clear and convincing evidence" that parental notification is not in the minor's best interests. Nor does the Georgia statute specifically require, as does HB 482, that the state court report an allegation of abuse if that is the basis for a waiver of notice. *See* Ga. Code Ann. § 15-11-114. Therefore, a minor seeking a waiver of
(continued...)

statute, the court of appeals wrote that "only one element of the judicial bypass procedure -- *an element not contested by Planned Parenthood* -- fails precisely to fit the *Bellotti* language." *Id.* at 1477 n.21 (emphasis added). Because the issue was not contested by the parties, the court's comments are the epitome of dicta. *See, e.g., Nichols v. Fearson*, 32 U.S. (7 Pet.) 103, 107 (1833) ("the point . . . was not argued, and the opinion expressed by the learned judge was, at best, but an obiter dictum"); *Webb v. State of Alabama, Dept. of Pensions and Security*, 850 F.2d 1518, 1521 n.2 (11th Cir. 1988) (family court statement was "dicta and not a holding on the merits" in part because "the issue had not been argued by the parties"). Indeed, the court in *Miller* was without jurisdiction to decide the constitutionality of an aspect of the statute that the plaintiffs there did not challenge. *See, e.g., Williams v. Zbaraz*, 448 U.S. 358, 367 (1980) (district court "exceeded its jurisdiction under Art. III in declaring the Hyde Amendment unconstitutional" where "[n]one of the parties . . . ever challenged the validity of the Hyde Amendment").

Dicta by one court of appeals is not an appropriate basis for finding a conflict between two courts of appeals. "[T]here must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles involved." ROBERT L. STERN, *et al.*, SUPREME COURT PRACTICE § 4.3, at 167 (7th ed.

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[8](...continued)
notice under the Georgia law need not fear that if she alleges abuse as a basis for a claim that parental notification is not in her best interests, the court hearing her request for a waiver will set in motion a process that may result in notice to her abusive parent after all. HB 482 imposes precisely this deterrent on abused minors, and gives them no certain way to obtain an abortion without parental involvement. *See* n.4 *supra*.

1993) (footnote omitted); *see also* Stewart A. Baker, *Symposium on Supreme Court Advocacy: A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611, 618 (1984) ("The split should arise from the courts' holdings; dicta, after all, may be reconsidered."). Thus, there is no conflict between the decision of the court below and "the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

III. NO ISSUE OF NATIONAL IMPORTANCE IS RAISED BY THIS CASE.

The State argues that this case involves "an issue of national importance [that] has been resolved without analysis of controlling opinions of this Court." Pet. 19. This argument is incorrect for two reasons.

First, the decision of the court of appeals, contrary to the implication by the State, does not affect the "eleven other states, all but one outside the Ninth Circuit, [that] have comparably-worded best interests provisions." *See* Pet. 9. The one State identified by the petitioner within the Ninth Circuit that has a "comparably-worded best interests provision" is Nevada, *see* Pet. at 16 n.3; but this statute was invalidated five years ago in *Glick*, and will remain invalid however this Court resolves the petition, because it was invalidated on grounds unrelated to its best interests standard. *See Glick*, 937 F.2d at 440-41 (Nevada statute's bypass procedure "does not meet the *Bellotti* expediency criterion").[9] The other states identified by the petitioner

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[9]The State also suggests that three parental consent laws using a standard similar to the Montana statute's are in jeopardy. Pet. 17 n.4 (listing Arizona, Michigan and Louisiana statutes). But the State appears to concede that, in the case of a consent statute, the standard
(continued...)

are outside the Ninth Circuit, and courts there will not be bound by the decision of the court below even if this Court denies the petition, for a denial of certiorari is accorded no precedential value. *United States v. Carver*, 260 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times."). Indeed, it is appropriate to deny the petition to await "further study" in the lower courts of the issue presented by the petition, study which may occur if the statutes in states outside the Ninth Circuit are challenged. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari).

In addition, the outcome of this case does not rest entirely on the issue raised by the petition, because there are two alternative grounds upon which this Court could affirm the decision of the court below. Ultimately, respondents would be likely to prevail on these grounds. First, this Court has disapproved a judicial bypass mechanism using a juvenile court that resulted in automatic notice to parents -- a mechanism identical to that of the Montana statute. *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 441 n.31 (1983); *see also Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1139 (7th Cir. 1983) ("[i]t would be unconstitutional for the juvenile court to allow parents to obtain indirect

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[9](...continued)
should be whether the abortion is in the minor's best interests. *See* Pet. at 16-17. In any event, two of the three statutes identified by the State are under injunction. *See Causeway Medical Suite v. Ieyoub*, 905 F. Supp. 360 (E.D. La. 1995) (enjoining Louisiana parental consent statute on several grounds aside from best interests standard); *Planned Parenthood of Southern Arizona v. Neely*, 942 F. Supp. 1578 (D. Ariz. 1996) (enjoining Arizona parental consent statute on several grounds aside from best interests standard).

notice of the waiver petition"). Second, HB 482's indirect notice to minors who prove a pattern of abuse renders it unconstitutional. *Hodgson v. Minnesota*, 497 U.S. 417, 460 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part); *see also Planned Parenthood v. Miller*, 63 F.3d 1452, 1461 (8th Cir. 1995) ("[i]n practice . . . South Dakota's abuse exception will sometimes result in parental notification, even if after-the-fact"), *cert. denied*, 116 S. Ct. 1582, 1583 (1996). Thus, granting the petition would decide the "best interests" issue in a case where it need not be decided, since the statute, regardless of the constitutionality of Montana's best interests standard, is invalid.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: January 13, 1997.

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In The

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October Term, 1996

MICHAEL SALVAGNI,

Petitioner,

vs.

SUSAN WICKLUND, M.D., et al,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF NEBRASKA, CALIFORNIA GEORGIA AND VIRGINIA IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI*

Twelve States have enacted parental notice statutes with judicial bypass procedures.[1] Each of those statutes contains language substantially similar to that found in Montana law for determining the circumstances under which a court, in a judicial bypass hearing, may waive notice to the parent or guardian of an immature minor seeking an abortion.[2] Under the Montana "Parental Notice of Abortion Act," a youth court is authorized to waive notice to the parent or guardian of an immature, pregnant minor of her decision to obtain an abortion if the minor demonstrates that "notification . . . is not in [her] best interests." Mont. Code Ann. § 50-20-212(5)(b).

On the authority of its earlier decision in *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), the court of appeals

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[1] Ark. Code Ann. § 20-16-801 *et seq.* (Michie 1991); Del. Code Ann. tit. 24, § 1780 *et seq.* (Interim Supp. 1995); Ga. Code Ann. § 15-11-110 *et seq.* (1994); Ill. Comp. Stat. Ann. ch. 750, § 70/1 *et seq.* (Michie Supp. 1996); Iowa Code Ann. § 135L.4 (West Legis. Serv. No. 1, 1996); Kan. Stat. Ann. § 65-6705 (Supp. 1995); Minn. Stat. Ann. § 144.343 (West 1989); Mont. Code Ann. § 50-20-201 *et seq.* (1995); Neb. Rev. Stat. Ann. § 71-6901 *et seq.* (Michie 1995); Nev. Rev. Stat. Ann. §§ 442.255, 442.2555 (Michie 1995); Ohio Rev. Code Ann. § 2151.85 (Anderson 1994); W. Va. Code § 16-2F-1 *et seq.* (1994).

[2] Ark. Code Ann. § 20-16-804(1)(B); Del. Code Ann. tit. 24, § 1784(b); Ga. Code Ann. § 15-11-114(c)(2); Ill. Comp. Stat. Ann. ch. 750, § 70/25(d)(2); Iowa Code Ann. § 135L.4(3)(e)(2); Kan. Stat. Ann. § 65-6705(e)(2); Minn. Stat. Ann. § 144.343(6)(c)(i); Neb. Rev. Stat. Ann. § 71-6903(1); Nev. Rev. Stat. Ann. § 442.255(2)(c); Ohio Rev. Code Ann. § 2151.85(C)(2); W. Va. Code § 16-2F-4(f)(2).

held that the Montana parental notice statute is unconstitutional. *Wicklund v. Salvagni*, 93 F.3d 567, 571-72 (9th Cir. 1996). In *Glick*, the Ninth Circuit struck down the Nevada parental notice statute because it "impermissibly constricted the meaning of 'best interests,' " in not allowing the court, in a bypass hearing, to waive notice to the parent of an immature minor if it determined that the abortion was in her best interests. 937 F.2d at 442. In so ruling, the court of appeals equated *notice* statutes with *consent* statutes and required the former to comply with the constitutionally-mandated standards for the latter, even though the decisions of this Court clearly have held otherwise.

As precedents which other circuit courts may consider, the Ninth Circuit's decisions in *Glick* and *Wicklund* may undermine the enforceability of parental notice statutes in several States. Although the Minnesota, Ohio and Georgia statutes, having been upheld either by this Court, *Hodgson v. Minnesota*, 497 U.S. 417 (1990), *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) ("*Akron Center II*"), or by another court of appeals,

Planned Parenthood Ass'n of Atlanta, Inc. v. Miller, 934 F.2d 1462 (11th Cir. 1991), presumably are immune from further challenge, the constitutionality of the parental notice statutes in Arkansas, Delaware, Illinois, Iowa, Kansas, Nebraska and West Virginia may be called into question on the authority of the Ninth Circuit's erroneous judgments in this case and in *Glick*. Moreover, other States within the Ninth Circuit that may wish to enact parental notice statutes may be deterred from doing so because of their uncertainty regarding what standards for

a judicial bypass are constitutionally required. To eliminate this uncertainty and to provide needed guidance to the States, *amici* respectfully request the Court to grant Montana's petition for *certiorari*.

SUMMARY OF ARGUMENT

On the basis of its earlier decision in *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), the court of appeals held that the Montana parental notice statute is unconstitutional. *Wicklund v. Salvagni*, 93 F.3d 567, 571-72 (9th Cir. 1996). In *Glick*, the court of appeals considered the constitutionality of the Nevada parental notice statute. Like the statute at issue here, the Nevada statute permitted a court in a judicial bypass hearing to waive notice to the parent or guardian of an immature minor only if it determined that notice was not in her best interests. Nev. Rev. Stat. Ann. § 442.255(2)(c). The statute, however, did not allow notice to be waived if the court determined that an abortion was in the minor's best interests.

The Ninth Circuit recognized in *Glick* that this Court has " 'expressly declined to equate notice requirements with consent requirements.' " 937 F.2d at 441 (quoting *H.L. v. Matheson*, 450 U.S. 398, 411 n.17 (1981)). Nevertheless, the court struck down the Nevada parental *notice* statute because it did not "satisfy the requirements for a parental *consent* statute." 937 F.2d at 436 (emphasis supplied). *Id.* at 442 ("the Nevada bypass procedure fails to meet the requirements for a *consent* statute bypass") (emphasis supplied). The court held that "a bypass procedure must allow the minor to show that even if she

cannot make the decision herself, the desired abortion would be in her best interests." *Id.* at 438. The Nevada statute, however, allowed a court to consider an immature minor's best interests "only with respect to the possible consequences of parental notification," and not with respect to the performance of the abortion itself. *Id.* at 439. "The best interests of a minor female in obtaining an abortion," the court explained, "may encompass far more than her interests in not notifying a parent of the abortion decision." *Id.* Quoting from Justice Powell's plurality opinion in *Bellotti v. Baird*, 443 U.S. 622 (1979), the court of appeals stated that " '[i]f, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement.' " *Glick*, 937 F.2d at 439 (quoting *Bellotti v. Baird*, 443 U.S. at 648). The court of appeals concluded that "the Nevada statute impermissibly narrows the *Bellotti* 'best interests' criterion, and is unconstitutional." *Glick*, 937 F.2d at 439. In striking down the Montana parental notice statute, the Ninth Circuit held that it was bound by its decision in *Glick*. *Wicklund*, 93 F.3d at 571-72.

Amici submit that the Ninth Circuit's opinions in *Glick* and *Wicklund* overlooked the obvious distinctions between parental *notice* laws and parental *consent* laws and erroneously held that the former are subject to the same constitutional standards as the latter, in the face of contrary statements by this Court. *See Matheson*, 450 U.S. at 411 n.17; *Hodgson*, 497 U.S. at 445 (Opinion of Stevens, J., in which O'Connor, J., concurred), *id.* at 496 (Opinion of Kennedy, J., concurring in the judgment in part and dissenting in part, in which Rehnquist, C.J., White, J., and

Scalia, J., concurred). In the case of an immature minor, the issue to be decided in a judicial bypass hearing conducted under a parental *consent* statute is whether the court may waive the requirement of a parent's consent and authorize the abortion on behalf of the minor based on her demonstration that the abortion would be in her best interests; the issue to be decided in a bypass hearing conducted under a *notice* statute, however, is whether the court may waive notice to the minor's parent(s) based on her showing that notice would not be in her best interests. Unlike a consent statute, under a notice statute no parent has the authority to prevent the minor from obtaining an abortion. Because the ultimate issue to be decided is different (waiver of consent in one case; waiver of notice in the other), the focus of the court's "best interests" inquiry necessarily differs.

The Ninth Circuit also ignored the fact that the Minnesota and Ohio parental notice statutes upheld by this Court in *Hodgson* and *Akron Center II*, respectively, are virtually indistinguishable from the Nevada and Montana statutes struck down by the Ninth Circuit in *Glick* and *Wicklund*, respectively. Finally, the Ninth Circuit's decision in this case is in conflict with the Eleventh Circuit's decision in *Planned Parenthood v. Miller*, 934 F.2d 1462, 1476 n.21 (11th Cir. 1991), upholding the Georgia parental notice statute. For all of these reasons, *amici* ask that this Court grant Montana's petition for *certiorari*.

ARGUMENT

THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S JUDGMENT BECAUSE THE COURT OF APPEALS APPLIED A CLEARLY ERRONEOUS LEGAL STANDARD IN EVALUATING THE CONSTITUTIONALITY OF A PARENTAL NOTICE STATUTE.

The Montana parental notice act permits a youth court to waive notice to the parent of an immature, pregnant minor of her decision to obtain an abortion if the minor demonstrates that "notification . . . is not in [her] best interests." Mont. Code Ann. § 50-20-212(5)(b). The Act, which requires notice to, not the consent of, either parent (or the minor's legal guardian), does not authorize a waiver upon a showing by an immature minor that an abortion would be in her best interests. The court of appeals, relying upon its earlier decision in *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), invalidating similar language in the Nevada parental notice statute, held that the "best interests" standard under the Montana Act is constitutionally deficient. *Wicklund v. Salvagni*, 93 F.3d 567 (1996). Quoting its opinion in *Glick*, the court in *Wicklund* held that the Montana parental notice statute " 'impermissibly constricted the meaning of "best interests," ' " by not allowing an immature minor to show in the bypass proceeding that an abortion "was in her best interests." *Wicklund*, 93 F.3d 567 at 571 (quoting *Glick*, 937 F.2d at 442). The court of appeals held, in effect, that an immature, pregnant minor *must* be allowed to obtain an abortion without notifying her parents even in those situations in which notification *would* be in her best interests. This holding is not required by the Constitution or any decision of this Court.

The Ninth Circuit's decisions in *Glick* and *Wicklund* effectively held that parental *notice* statutes are the functional equivalents of parental *consent* statutes and, therefore, are subject to the same standards for determining the adequacy of the judicial bypass procedure. *Glick*, 937 F.2d at 438-39; *Wicklund*, 93 F.3d at 571-72. That holding, in turn, was apparently based on a misreading of Justice Powell's plurality opinion in *Bellotti v. Baird*, 443 U.S. 622 (1979).

In *Bellotti*, this Court struck down the Massachusetts parental consent statute because it did not provide for an adequate judicial bypass procedure. Noting "the unique nature and consequences of the abortion decision," a plurality of the Court held that "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." 443 U.S. at 643 (Opinion of Powell, J.). In such a proceeding, the pregnant minor must be given the opportunity to show either "that she is mature enough and well enough informed to make her abortion decision . . . independently of her parents' wishes," or "that even if she is not able to make this decision independently, the desired abortion would be in her best interests." *Id.* at 643-44. The Court has continued to apply this standard in evaluating parental consent statutes.[3]

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[3] *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 439-42 (1983) ("*Akron Center I*"); *Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 490-93 (1983) ("*Ashcroft*"); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 899-900 (1992).

In *Bellotti*, the Court also struck down a requirement in the Massachusetts parental consent law that both parents be given prior notice of any judicial bypass proceedings in which the pregnant minor might seek a court-authorized abortion. This requirement, according to the plurality opinion, "would impose an undue burden upon the exercise by minors of the right to seek an abortion." 443 U.S. at 647 (Opinion of Powell, J.).

> [M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in . . . court provides an effective avenue of relief for some of those who need it the most.

Id. In ruling that this requirement was unconstitutional, Justice Powell concluded:

> [E]very minor must have the opportunity – if she so desires – to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

Id. at 647-48. Justice Powell, however, also recognized countervailing interests in allowing parental consultation:

> There is, however, an important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision. Also, . . . parents naturally take an interest in the welfare of their children – an interest that is particularly strong where a normal family relationship exists and where the child is living with one or both parents. These factors properly may be taken into account by a court called upon to determine whether an abortion in fact is in a minor's best interest. *If, all things considered, the court determines that the abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement.* On the other hand, the court may deny the abortion request of an immature minor in the absence of consultation if it concludes that her best interests would be served thereby, or the court may in such a case defer decision until there is parental consultation in which the court may participate.

Id. at 648 (emphasis supplied).

It is clear from Justice Powell's opinion in *Bellotti* that he envisioned "parental involvement" in an immature minor's decision to have an abortion after she sought a waiver of consent in a judicial bypass hearing, if the court conducting the hearing believed that such involvement was in her best interests. In striking down the Nevada parental notice law, the Ninth Circuit, quoting the emphasized language from Justice Powell's opinion in

Bellotti, concluded that "the Nevada statute impermissibly narrows the *Bellotti* 'best interests' criterion, and is unconstitutional." *Glick*, 937 F.2d at 439. This was erroneous because, in quoting the emphasized language out of context, the *Glick* court failed to recognize that the *Bellotti* plurality opinion expressly indicated "all things considered" included the question as to whether parental consultation was appropriate and that, where parental notice was deemed in the best interests of the minor, the bypass decision-maker possessed the discretion to direct consultation *before* disposing of the petition on its merits. *Bellotti* thus stands for the unremarkable proposition that the parental consultation issue, even under a consent statute, is determined with reference to whether an abortion without such consultation would be in the minor's best interests. *Glick's* conclusion was also erroneous because the "parental involvement" mandated in the Massachusetts statute struck down in *Bellotti* was an integral component of a *consent* statute, not a *notice* statute. The ultimate issue to be decided under the Massachusetts statute was whether an abortion would be in the minor's best interests, not whether notice to her parents of her intention to obtain an abortion would be in her best interests. Contrary to the implication of the Ninth Circuit's opinions in *Glick* and *Wicklund*, no decision of this Court equates notice statutes with consent statutes for purposes of constitutional analysis.[4] The Court, in fact, has rejected that equation.

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[4] Neither *Ashcroft* nor *Akron Center I* stands for the contrary. At issue in *Ashcroft* was the constitutionality of a parental consent, not a parental notice, statute. The Court noted that the State had not appealed the Eighth Circuit's judgment holding unconstitutional a notice requirement in the same law. 462 U.S. at 491 n.17. In *Akron Center I*, the Court considered the constitutionality of a provision in an ordinance that mandated parental consent but which did not establish a judicial bypass procedure. 462 U.S. at 439-41. Although plaintiffs did not appeal the Sixth Circuit's judgment upholding another provision in the same ordinance requiring parental notice, *id.* at 439 n.29, the Court, citing various concurring and dissenting opinions in *H.L. v. Matheson*, 450 U.S. 398 (1981), stated in *dicta* that a law requiring notice to the parents of a mature minor would be unconstitutional, *id.* at 441 n.31, a question not presented here.

In *H.L. v. Matheson*, 450 U.S. 398 (1981), this Court held that a Utah statute requiring a physician to give notice, if possible, to the parents of a pregnant minor prior to performing an abortion could be constitutionally applied to an immature, unmarried, unemancipated minor who lived with and was dependent upon her parents and who made no claim that notification of her parents would not be in her best interests. In upholding the law, as applied, the Court noted that "[t]he Utah statute gives neither parents nor judges a veto power over the minor's abortion decision," *id.* at 411, and expressly rejected the dissenters' argument that "a requirement of notice to the parents is the functional equivalent of a requirement of parental consent." *Id.* at 411 n.17.

In *Hodgson*, the Court upheld the Minnesota two-parent notice statute with a judicial bypass. A clear majority of the Court agreed that the standards for determining the validity of consent statutes do not apply to notice statutes. Writing for himself, Chief Justice Rehnquist, Justice White and Justice Scalia, Justice Kennedy stated:

> The difference between notice and consent was apparent to us before and is apparent now. Unlike parental consent laws, a law requiring parental notice does not give any third party the legal right to make the minor's decision for her, or to prevent her from obtaining an abortion should she choose to have one performed. We have acknowledged this distinction as "fundamental," and as one "substantially modify[ing] the federal constitutional challenge." [Citations omitted]. The law before us does not place an absolute obstacle before any minor seeking to obtain an abortion, and it represents a considered weighing of the competing interests of minors and their parents.

497 U.S. at 496 (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Stevens, joined by Justice O'Connor, stated that "the Court . . . has never challenged a State's reasonable judgment that the decision [of a minor to obtain an abortion] should be made after notification to and consultation with a parent." *Id.* at 445 (Opinion of Stevens, J.). In another part of his opinion which Justice O'Connor joined, Justice Stevens stated further that "a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion would reasonably further the legitimate state interest in ensuring that the minor's decision is knowing and intelligent." *Id.* at 448.

Although the Court has not yet decided "the specific question whether a judicial bypass procedure is necessary in order to save the constitutionality of a one-parent notice statute," *Akron Center II*, 497 U.S. at 522 (Stevens, J., concurring in part and concurring in the judgment), and has declined an invitation to consider this issue, *see*

Janklow v. Planned Parenthood, Sioux Falls Clinic, 116 S.Ct. 1582 (1996), Justice Stevens has expressed the view that in a notice statute, "the State must provide an adequate mechanism for cases in which the minor is mature or *notice would not be in her best interests.*" *Akron Center II*, 497 U.S. at 522 (emphasis supplied). Thus, the standard, according to Justice Stevens, is *not* whether the *abortion* would be in the minor's best interests, but whether *notification* would be in her best interests.

Finally, it must be emphasized that the "best interests" standards in the Minnesota and Ohio laws are virtually the same as the standard in the Montana law. The Minnesota law upheld in *Hodgson* allows a judicial waiver if the court determines that "the performance of an abortion upon [the pregnant minor] without notification of her parents, guardian, or conservator would be in her best interests . . . . " Minn. Stat. Ann. § 144.343(6)(c)(i) (West 1989), quoted in *Hodgson*, 497 U.S. at 427 n.9. The Ohio law upheld in *Akron Center II* allows a waiver upon a finding that "notification of the parents, guardian, or custodian of the [pregnant minor] is not in the best interest of the [minor]." Ohio Rev. Code Ann. § 2151.85(C)(2) (Anderson 1994), summarized in *Akron Center II*, 497 U.S. at 508. Those standards, which focus on whether *notice*, not the *abortion*, would be in the minor's best interests, are the same as that contained in the Montana statute. *See* Mont. Code Ann. § 50-20-212(5)(b) (notice to the parent of an immature, pregnant minor of her intention to obtain an abortion may be waived if the minor demonstrates that "notification is not in [her] best interests"). The court of appeals ignored the substantial similarity in language between the Montana parental notice statute, which it

struck down, and the Minnesota and Ohio parental notice statutes, which this Court upheld. In so doing, the court erred.[5]

CONCLUSION

For the foregoing reasons, *amici curiae*, States respectfully request this Honorable Court to grant Montana's petition for *certiorari* and set the case down for briefing and argument or, in the alternative, grant the petition and summarily reverse the judgment of the court of appeals on the authority of this Court's decisions in *Hodgson v. Minnesota* and *Ohio v. Akron Center for Reproductive Health*.

Respectfully submitted,

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[5] In addition to the Argument raised in this Brief, *amici* also adopt Montana's analysis of the "undue burden" standard as articulated by the Joint Opinon in *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833 (1992).

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

MARTIN D. LAMBERT, in his official capacity as Gallatin County Attorney,

Petitioner,

v.

SUSAN WICKLUND, M.D.; JAMES H. ARMSTRONG, M.D.; LINDSAY RICHARDS, M.D.; SUSAN CAHILL, P.A.; DOUBLAS WEBBER, M.D.; BETH E. THOMPSON, M.D.; MARY STRANAHAN, D.O.; and MARK MILES, M.D., on behalf of themselves and their patients throughout Montana, the surrounding states and Canada,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

The Respondents' opposition to the petition misconstrues this Court's decision in *Bellotti v. Baird*, 443 U.S. 622 (1979); glosses over the significance of the fact that the Court specifically upheld the constitutional adequacy of parental notice statutes in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), and *Hodgson v. Minnesota*, 497 U.S. 417 (1990), with best interests standards substantively indistinguishable from that in Mont. Code Ann. § 50-20-212(5)(b) (1995); and reflects a fundamental misunderstanding of the differences between parental notice and parental consent statutes. The opposition additionally treats as dicta in *Planned Parenthood of Atlanta, Inc. v. Miller*, 934 F.2d 1462 (11th Cir. 1991), what the court there clearly intended to be a binding determination and dismisses the importance of the decision below to Montana and other States with comparably-worded best interests standards. The Respondents' forced reasoning serves principally to underscore the appropriateness of granting the petition and either summarily reversing the Court of Appeals or setting this matter for plenary briefing and argument.

ARGUMENT

I. THE RESPONDENTS' READING OF *BELLOTTI* CANNOT BE ACCEPTED IN VIEW OF THE COURT'S ANALYSIS THERE OR IN *MATHESON*.

The Respondents argue that, under *Bellotti*, a court first must determine whether an abortion is in an immature minor's best interests before deciding whether waiver of the parental notice requirement should be granted. Their argument is grounded in the plurality opinion's statement that, "[i]f, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement." 443 U.S. at 648; *see* Resp'ts Br.

in Opp'n ("Opp'n") at 5. That statement, however, must be taken in context and, when so taken, does not support the legally and practically odd result advanced by the Respondents.

The Massachusetts statute at issue in *Bellotti* contained a two-parent consent requirement. 443 U.S. at 625 (quoting Mass. Gen. Laws Ann. ch. 112, § 12S (West Supp. 1979)). That requirement was subject to judicial waiver, but the Massachusetts Supreme Judicial Court construed the statute to require parental notification of the bypass proceeding unless a parent was unavailable or an emergency existed. *Id.* at 630. One question before this Court accordingly was whether notification could be mandated in all other instances consistently with the Due Process Clause. In answering the question negatively, the plurality opinion stated "every minor must have the opportunity – if she so desires – to go directly to a court without first consulting or notifying her parents." *Id.* at 647. The Court nonetheless held further that a bypass decisionmaker possesses the discretion to deny the request outright on the ground that an abortion without parental consent is not in the minor's best interests *or* to defer resolution of the waiver request. *Id.* at 648.

The standard governing exercise of that discretion in the latter instance plainly is not whether the abortion itself is in the minor's best interests – since answering that question would dispose of the request's merits under a consent statute – but whether the minor's best interests would be served by parental consultation prior to resolution of the minor's petition. Parental notice statutes like Montana's implicate only the second of these situations because the minor, not a court or a parent, ultimately determines whether an abortion occurs. The need for or the advisability of parental notification is, in short, part and parcel of the "all things considered" referred to in the *Bellotti* excerpt upon which the Respondents rely. *See* Br. Amicus Curiae of States of Nebraska et al. at 9-10.

The Respondents' reading of *Bellotti* also runs headlong into this Court's decision two years later in *H.L. v. Matheson*, 450 U.S. 396 (1981). There, the Court upheld a Utah parental notice statute without a bypass provision in a class action challenge by an unemancipated minor who made no showing as to her maturity or relationship with her parents – i.e., who failed to establish either that she was mature or that notification was not in her best interests. *See id.* at 405. The Court found no need to decide whether a bypass procedure was constitutionally mandated where simple parental notice was compelled because "[m]embers of the particular class before us in this case have no constitutional right to notify a court in lieu of notifying their parents." *Id.* at 412 n.22. The only conclusion to be drawn from the Court's statement in this regard was that notification can be required without unduly burdening an immature minor's access to abortion if she fails to establish such notice is not in her best interests.

Indeed, that is exactly the meaning Justice Powell assigned in his *Matheson* concurring opinion, where he stated that he joined with the majority "on the understanding that [its opinion] leaves open the question whether [the Utah statute] unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification." *Id.* at 414. He then reiterated his view that, while the petitioner's position that the Utah statute was "per se an invalid burden on the asserted right of a minor to make the abortion decision" (*id.* at 419), "a State may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently *or that notification otherwise would not be in her best interests*" (*id.* at 420; emphasis supplied). The Respondents' interpretation of *Bellotti* cannot be squared with that decision or *Matheson*.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH *AKRON* AND *HODGSON*.

The Respondents argue that "[n]o opinion of this Court since *Bellotti* . . . has purported to analyze the standard applicable to immature minors seeking authorization for an abortion under a parental notification statute." Opp'n at 7. They thus claim that "[n]either *Hodgson* nor *Akron II* . . . involved a challenge to the judicial bypass standards applicable to immature minors." *Id.* at 6. Nonetheless, in *Akron* the majority opinion equated the best interests standard in Ohio Rev. Code Ann. § 2151.85(C)(2) (Anderson 1994), which is identical to § 50-20-212(5)(b), to the best interests standard in the *Bellotti* statute (497 U.S. at 511), while Justice Stevens' concurrence expressed his view that parental notice laws must provide an opportunity for immature minors to show that "*notice* would not be in her best interests" (*id.* at 522; emphasis supplied). In the companion case, *Hodgson*, Justice O'Connor's opinion controlled and found the Minnesota two-parent notice statute permissible only because of a bypass procedure that, in relevant part, used a best interests standard comparable to Ohio's. 497 U.S. at 427 n.9 (op. of Stevens, J.); *id.* at 461 (op. of O'Connor, J.).

The Respondents' contention that this Court has not upheld the constitutional adequacy of the standard in § 50-20-212(5)(b) and in a dozen other States' laws accordingly strains credulity. Yet even were they correct, the appropriateness of resolving the issue would be unaffected. The Court of Appeals' decision in *Glick* notwithstanding, *Akron* and *Hodgson* cannot be read fairly to establish other than that any bypass procedure substantively indistinguishable from those upheld in those cases is valid under the Due Process Clause in a facial challenge like the one here. However, if that reading is inaccurate, the Court should clarify the standard and thereby allow States desiring to enact parental consent legislation

to do so consistently with applicable constitutional restraints.

III. THE RESPONDENTS' PORTRAYAL OF THE MONTANA STANDARD AS AN UNDUE BURDEN NOT ONLY MISCONSTRUES THE DIFFERENCES BETWEEN PARENTAL NOTICE AND CONSENT STATUTES BUT ALSO IGNORES *CASEY*.

The Respondents justify the rule adopted in *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), and applied below by contending that use of the best interests standard in the Montana statute "will prevent some minors from obtaining an abortion without parental involvement even though, under the correct *Bellotti* test, they would obtain judicial approval for an abortion" (Opp'n at 9) and that, "[b]y shifting the emphasis away from the best interests of the child in having the abortion, [the Montana statute] violates the purpose of the bypass procedure" (*id.* at 13). Their analysis fails to account for the differing purpose of the bypass procedure under parental consent and notice laws or for this Court's reasoning in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

That the focus of the bypass procedure under a parental notice statute is on whether the notice requirement should be waived is hardly surprising. The minor is not asking the bypass decisionmaker to stand in the shoes of her parent for purposes of determining whether an abortion should occur, since that decision is the minor's alone to make. Even if one accepts arguendo the Respondents' speculation over the relative difficulty of showing that notice, as opposed to the abortion itself, is in the minor's best interests (Opp'n at 10-11), evidence going to the advisability of the latter is, except as it bears upon the appropriateness of notice, unnecessary given the minor's absolute right to have the abortion regardless of whether a parent or a third party believes it is in her best interests. Thus, the "purpose of the bypass proceeding" under a

notice statute is not, as the Respondents assert, for "the court to function as a surrogate for a parent, considering, as the parent would, whether the *abortion* is in the minor's best interest." Opp'n at 12; *see Matheson*, 450 U.S. at 411 ("[t]he Utah [parental notice] statute gives neither parents nor judges a veto power over the minor's abortion decision"); *Bellotti*, 443 U.S. at 654 & n.1 (Stevens, J., concurring) (observing that, under the Massachusetts parental consent statute, "the minor's decision to secure an abortion is subject to an absolute third-party veto," and noting further that "[b]y affording such a veto, the . . . statute does far more than simply provide for notice to the parents").

The concern animating the Respondents' position is their apparent belief that parents will overbear their daughter's decision for reasons unrelated to her best interests or otherwise will retaliate against her. Opp'n at 8, 11. Presumably, however, bypass decisionmakers will be sensitive to those possibilities because they relate directly to whether parental notice is in the minor's best interests. The Respondents ignore this presumption and, in so doing, the admonition in the *Casey* joint opinion that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect of the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." 505 U.S. at 877. Simply put, it makes no sense to characterize the standard in § 50-20-212(5)(b) as embodying an undue burden when it merely asks a disinterested third party to determine whether the presumption that parents will act to further the best interests of their child has been rebutted. *Id.* at 895 (parental notice statutes "are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart").

IV. A CONFLICT EXISTS BETWEEN *MILLER* AND THE DECISION BELOW.

The Respondents contend the Eleventh Circuit's determination in *Miller* that the Georgia bypass procedure's best interests provision "sufficiently accords with constitutional standards" (934 F.2d at 1477 n.21) is dicta which should be disregarded for the purpose of establishing an inter-circuit conflict under S. Ct. R. 10(a). Opp'n at 13-15. Nevertheless, the *Miller* court undoubtedly did not believe its analysis was dicta, since it was one predicate for a "hold[ing]" that the Georgia law comported with *Bellotti* requirements and thereby eliminated the need to determine whether any bypass procedure was necessary in a parental notice statute and, if so, the extent to which such a procedure need parallel *Bellotti*. *Id.*; *see also id.* at 1471 ("[i]n part IV, we show that the Georgia Act's judicial bypass procedure, even if judged pursuant to *Bellotti* requirements, survives constitutional scrutiny").

The rather startling contention by the Respondents that the Eleventh Circuit, and by implication this Court in *Akron*, was without jurisdiction to decide the validity of the best interests provision because it was not challenged in *Miller* (Opp'n at 14) similarly ignores the fact that plaintiffs there had attacked the validity of the notice-statute bypass procedure and that the court of appeals, following *Akron*'s lead, determined to resolve the challenge by reference to the more stringent *Bellotti* consent-statute requirements. Moreover, as noted in the petition (Pet. at 19 n.6), the plaintiffs in *Glick* did not challenge the validity of the best interests standard in the Nevada statute, and the Respondents thus ask this Court to deny the petition despite law-of-the-circuit reliance by the panel below on a decision that, were their reasoning credited, was issued in relevant part without jurisdiction. It is instead plain that a justiciable controversy existed over the validity of the bypass procedure in *Miller* and *Glick* and that, at least as the court below construed *Glick*,

both circuits employed *Bellotti* standards to reach opposite results which would have been reviewable by this Court. *See Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995).[1]

V. AN ISSUE OF NATIONAL IMPORTANCE EXISTS.

The Respondents discount the significance of the Court of Appeals' decision, pointing out that the only State other than Montana whose federal courts are bound by the opinion is Nevada. Opp'n at 15-16. Even if one leaves aside the incompatibility of the Ninth Circuit's views with this Court's decisions and the Eleventh Circuit's opinion in *Miller*, the inescapable fact is that *every* State that has enacted a parental notice statute with a bypass procedure has utilized a best interests formulation similar or identical to Montana's.

The Respondents may well be correct in their implicit suggestion that the decision below will be treated as an anomaly in future litigation. Opp'n at 16. Nonetheless, the jurisprudential limbo they propose for the sensitive issue of parents' involvement in their children's abortion decisionmaking cannot be reconciled with the recognition

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[1] The Respondents' reliance on *Williams v Zbaraz*, 448 U.S. 358 (1980), is misplaced because there the court of appeals sua sponte placed at issue in a remand order the constitutionality of a federal statute when only a state law had been challenged and the plaintiffs' claim was capable of resolution without reference to the federal statute's validity. *Id.* at 364-68. In *Miller* and *Glick*, of course, a justiciable controversy existed over the validity of the bypass procedures, and the disputes' justiciability was unaffected by the courts' determination to resolve the challenges on somewhat different grounds than those advanced by the litigants. *Cf. Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77 (1990) (resolving case on the basis of an issue neither decided below nor argued by the parties where it "was antecedent to [the questions presented] and ultimately dispositive of the . . . dispute").

that, commencing in *Roe v. Wade*, 410 U.S. 113 (1973), this Court has embarked on a course that "calls for the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Casey*, 505 U.S. at 867. Where the meaning of that mandate has been obscured by a lower court's erroneous interpretation, it should be explained or, as here, re-explained to avoid further dispute.

The Respondents suggest, finally, that the petition should be denied because there are alternative grounds on which the judgment below can be affirmed. Opp'n at 16-17. Those grounds involve quite problematic claims that were not addressed by either court below. Pet. App. at 12a, 16a. Accepting the Respondents' position therefore would insulate from review an issue that *was* decided on the basis of entirely separate questions never considered on the merits. They cite no relevant authority for this result. The unaddressed claims, which are outside the question presented in both the petition and the opposition, should be resolved by the lower courts on remand if the Court of Appeals' judgment is reversed. *See, e.g., Lebron*, 115 S. Ct. at 965-66; *Yee v. City of Escondido*, 503 U.S. 519, 534-38 (1992).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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January 1997

SUPREME COURT OF THE UNITED STATES

MARTIN D. LAMBERT, GALLATIN COUNTY ATTORNEY *v.* SUSAN WICKLUND ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96–858. Decided March 31, 1997

PER CURIAM.

Before a minor has an abortion in Montana, one of her parents must be notified. A waiver, or "judicial bypass," of the notification requirement is allowed if the minor can convince a court that notification would not be in her best interests. The Court of Appeals for the Ninth Circuit struck down Montana's parental notification law as unconstitutional, holding that the judicial bypass did not sufficiently protect the right of minors to have an abortion. Because the Ninth Circuit's holding is in direct conflict with our precedents, we grant the petition for a writ of certiorari and reverse.

In 1995, Montana enacted the Parental Notice of Abortion Act. The Act prohibits a physician from performing an abortion on a minor unless the physician has notified one of the minor's parents or the minor's legal guardian 48 hours in advance. Mont. Code Ann. §50–20–204 (1995).[1] However, an "unemancipated"

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[1]Section 50–20–204 provides in relevant part: "A physician may not perform an abortion upon a minor or an incompetent person unless the physician has given at least 48 hours' actual notice to one parent or to the legal guardian of the pregnant minor or incompetent person of the physician's intention to perform the abortion. . . . If actual notice is not possible after a reasonable effort, the physician or the physician's agent shall give alternate notice as provided in 50–20–205." Section 50–20–205 provides for

minor[2] may petition the state youth court to waive the notification requirement, pursuant to the statute's "judicial bypass" provision. §50–20–212 (quoted in full in an Appendix to this opinion). The provision gives the minor a right to court-appointed counsel, and guarantees expeditious handling of the minor's petition (since the petition is automatically granted if the youth court fails to rule on the petition within 48 hours from the time it is filed). §§50–20–212(2)(a), (3). The minor's identity remains anonymous, and the proceedings and related documents are kept confidential. §50–20–212(3).

If the court finds by clear and convincing evidence that *any* of the following three conditions are met, it must grant the petition and waive the notice requirement: (i) the minor is "sufficiently mature to decide whether to have an abortion"; (ii) "there is evidence of a pattern of physical, sexual, or emotional abuse" of the minor by one of her parents, a guardian, or a custodian; or (iii) "the *notification* of a parent or guardian is not in the best interests of the [minor]." §§50–20–212(4)–(5) (emphasis added). It is this third condition which is at issue here.

Before the Act's effective date, respondents—several physicians who perform abortions, and other medical personnel—filed a complaint seeking a declaration that the Act was unconstitutional and an order enjoining its enforcement. The District Court for the District of Montana, addressing only one of respondents' arguments, held that the Act was unconstitutional because the third condition set out above was too narrow. According to the District Court, our precedents require that judicial bypass mechanisms authorize waiver of the notice

notice by certified mail. The notice requirement does not apply if "a medical emergency exists and there is insufficient time to provide notice." Mont. Code Ann. §50–20–208(1) (1995).

[2] "'Emancipated minor' means a person under 18 years of age who is or has been married or who has been granted an order of limited emancipation by a court . . . ." §50–20–203(3).

requirement whenever "the *abortion* would be in [the minor's] best interests," not just when "*notification* would not be in the minor's best interests." App. to Pet. for Cert. 17a (emphasis in original) (citing *Bellotti* v. *Baird*, 443 U. S. 622, 640–642 (1979) (plurality opinion)). Three days before the Act was to go into effect, the District Court enjoined its enforcement.

The Court of Appeals affirmed, stating that it was bound by its prior decision in *Glick* v. *McKay*, 937 F. 2d 434 (1991) [App. to Cert. Pet. 37a]. See *Wicklund* v. *Salvagni*, 93 F. 3d 567, 571–572 (1996). *Glick* struck down Nevada's parental notification statute which, like Montana's statute here, allowed a minor to bypass the notification requirement if a court determined that the *notification* would not be in the minor's best interests. The court's conclusion was based on its analysis of our decisions in *Bellotti* v. *Baird*, 443 U. S. 622 (1979), and *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502 (1990) (*Akron II*).

In *Bellotti*, we struck down a statute requiring a minor to obtain the *consent* of both parents before having an abortion, subject to a judicial bypass provision, because the judicial bypass provision was too restrictive, unconstitutionally burdening a minor's right to an abortion. 443 U. S., at 647 (plurality opinion); *id.*, at 655–656 (STEVENS, J., concurring in judgment). The Court's principal opinion explained that a constitutional parental consent statute must contain a bypass provision that meets four criteria: (i) allow the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently; (ii) allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests; (iii) ensure the minor's anonymity; and (iv) provide for expeditious bypass procedures. *Id.*, at 643–644 (plurality opinion). See also *Akron II*, 497 U. S., at 511–513 (restating the four requirements).

In *Akron II*, we upheld a statute requiring a minor

to *notify* one parent before having an abortion, subject to a judicial bypass provision. We declined to decide whether a parental notification statute must include some sort of bypass provision to be constitutional. *Id.*, at 510. Instead, we held that this bypass provision satisfied the four *Bellotti* criteria required for bypass provisions in parental *consent* statutes, and that *a fortiori* it satisfied any criteria that might be required for bypass provisions in parental notification statutes. Critically for the case now before us, the judicial bypass provision we examined in *Akron II* was substantively indistinguishable from both the Montana judicial bypass provision at issue here and the Nevada provision at issue in *Glick*. See 497 U. S., at 508 (summarizing Ohio Rev. Code Ann. §2151.85 (1995)). The judicial bypass provision in *Akron II* allowed a court to waive the notification requirement if it determined by clear and convincing evidence "that *notice* is not in [the minor's] best interests" (not that *an abortion* is in her best interests). *Ibid.* (emphasis added) (citing Ohio Rev. Code §2151.85(A)(4)). And we explicitly held that this provision satisfied the second *Bellotti* requirement, that "the procedure must allow the minor to show that, even if she cannot make the abortion decision by herself, 'the desired abortion would be in her best interests.'" *Id.*, at 511 (quoting *Bellotti, supra,* at 644).

Despite the fact that *Akron II* involved a parental notification statute, and *Bellotti* involved a parental consent statute;[3] despite the fact that *Akron II* involved a statute virtually identical to the Nevada statute at issue in *Glick*; and despite the fact that *Akron II* explicitly held that the statute met all of the *Bellotti* requirements, the Ninth Circuit in *Glick* struck down

[3] See *Bellotti*, 443 U. S., at 654, n. 1 (STEVENS, J., concurring in judgment) ("[T]his case [does not] determin[e] the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto").

Nevada's parental notification statute as inconsistent with *Bellotti*:

> "Rather than requiring the reviewing court to consider the minor's 'best interests' generally, the Nevada statute requires the consideration of "best interests" only with respect to the possible consequences of parental notification. The best interests of a minor female in obtaining an abortion may encompass far more than her interests in not notifying a parent of the abortion decision. Furthermore, in *Bellotti*, the court expressly stated, '[i]f, *all things considered*, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement.' *Bellotti*, 443 U. S. at 648 (emphasis added). Therefore, the Nevada statute impermissibly narrows the *Bellotti* 'best interests' criterion, and is unconstitutional." 937 F. 2d, at 439.

Based entirely on *Glick*, the Ninth Circuit in this case affirmed the District Court's ruling that the Montana statute is unconstitutional, since the statute allows waiver of the notification requirement only if the youth court determines that notification—not the abortion itself—is not in the minor's best interests. 93 F. 3d, at 572.

As should be evident from the foregoing, this decision simply cannot be squared with our decision in *Akron II*. The Ohio parental notification statute at issue there was indistinguishable in any relevant way from the Montana statute at issue here. Both allow for judicial bypass if the minor shows that parental *notification* is not in her best interests. We asked in *Akron II* whether this met the *Bellotti* requirement that the minor be allowed to show that "the desired abortion would be in her best interests." We explicitly held that it did. 497 U. S., at 511. Thus, the Montana statute meets this requirement, too. In concluding otherwise, the Ninth Circuit was mistaken.

Respondents (as did the Ninth Circuit in *Glick*) place great emphasis on our statement in *Akron II*, that "[t]he statute requires the juvenile court to authorize the minor's consent where the court determines that *the abortion* is in the minor's best interest." 497 U. S., at 511 (emphasis added) (citing Ohio Rev. Code Ann. §2151.85(C)(2)). But since we had clearly stated that the statute actually required such authorization only when the court determined that *notification* would not be in the minor's best interests, it is wrong to take our statement to imply that the statute said otherwise. Rather, underlying our statement was an assumption that a judicial bypass procedure requiring a minor to show that *parental notification is not* in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that *abortion without notification is* in her best interests, as the context of the opinion, the statutory language, and the concurring opinion all make clear.[4]

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[4]See 497 U. S., at 517 ("if she can demonstrate that her maturity or best interests favor abortion without notifying one of her parents"); *id.*, at 522 (STEVENS, J., concurring in part and concurring in judgment) ("Although it need not take the form of a judicial bypass, the State must provide an adequate mechanism for cases in which the minor is mature or *notice* would not be in her best interests") (emphasis added); Ohio Rev. Code Ann. §2151.85(C)(2) (1995) ("[I]f the court finds, by clear and convincing evidence, . . . that the notification of the parents, guardian, or custodian of the [minor] otherwise is not in the best interest of [the minor], the court shall issue an order authorizing the [minor] to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian"). See also *Hodgson* v. *Minnesota*, 497 U. S. 417, 497 (1990) (KENNEDY, J., concurring in judgment in part and dissenting in part) (interpreting Minnesota judicial bypass procedure which requires minor to show that "an *abortion . . . without notification* of her parents, guardian, or conservator *would be* in her best interests," Minn. Stat. §144.343(6) (1988) (emphasis added), as authorizing exemption from strictures of parental notification scheme in "those cases in which *notification of the minor's parents is not* in the minor's best interests") (emphasis added).

Respondents, echoing the Ninth Circuit in *Glick*, claim that there is a constitutionally significant distinction between requiring a minor to show that parental notification is not in her best interests, and requiring a minor to show that an abortion (without such notification) is in her best interests. See Brief in Opposition 12–13; 937 F. 2d, at 438–439. But the Montana statute draws no such distinction, and respondents cite no Montana state court decision suggesting that the statute permits a court to separate the question whether parental notification is not in a minor's best interest from an inquiry into whether abortion (without notification) is in the minor's best interest. As with the Ohio statute in *Akron II*, the challenge to the Montana statute here is a facial one. Under these circumstances, the Ninth Circuit was incorrect to assume that Montana's statute "narrow[ed]" the *Bellotti* test, 937 F. 2d, at 439, as interpreted in *Akron II*.

Because the reasons given by the District Court and the Ninth Circuit for striking down the Act are inconsistent with our precedents, we grant the petition for a writ of certiorari and reverse the judgment of the Ninth Circuit.

It is so ordered.

APPENDIX

Mont. Code Ann. §50–20–212 (1995):

"(1) The requirements and procedures under this section are available to minors and incompetent persons whether or not they are residents of this state.

"(2) (a) The minor or incompetent person may petition the youth court for a waiver of the notice requirement and may participate in the proceedings on the person's own behalf. The petition must include a statement that the petitioner is pregnant and is not emancipated. The court may appoint a guardian ad litem for the petitioner. A guardian ad litem is required to maintain the confidentiality of the proceedings. The youth court shall advise the petitioner of the right to court-appointed counsel and shall provide the petitioner with counsel upon request.

"(b) If the petition filed under subsection (2)(a) alleges abuse as a basis for waiver of notice, the youth court shall treat the petition as a report under 41–3–202. The provisions of Title 41, chapter 3, part 2, apply to an investigation conducted pursuant to this subsection.

"(3) Proceedings under this section are confidential and must ensure the anonymity of the petitioner. All proceedings under this section must be sealed. The petitioner may file the petition using a pseudonym or using the petitioner's initials. All documents related to the petition are confidential and are not available to the public. The proceedings on the petition must be given preference over other pending matters to the extent necessary to ensure that the court reaches a prompt decision. The court shall issue written findings of fact and conclusions of law and rule within 48 hours of the time that the petition is filed unless the time is extended at the request of the petitioner. If the court fails to rule within 48 hours and the time is not extended, the petition is granted and the notice requirement is waived.

"(4) If the court finds by clear and convincing evidence that the petitioner is sufficiently mature to decide whether to have an abortion, the court shall issue an order authorizing the minor to consent to the performance or inducement of an abortion without the notification of a parent or guardian.

"(5) The court shall issue an order authorizing the petitioner to consent to an abortion without the notification of a parent or guardian if the court finds, by clear and convincing evidence, that:

"(a) there is evidence of a pattern of physical, sexual, or emotional abuse of the petitioner by one or both parents, a guardian, or a custodian; or

"(b) the notification of a parent of guardian is not in the best interests of the petitioner.

"(6) If the court does not make a finding specified in subsection (4) or (5), the court shall dismiss the petition.

"(7) A court that conducts proceedings under this section shall issue written and specific findings of fact and conclusions of law supporting its decision and shall order that a confidential record of the evidence, findings, and conclusions be maintained.

"(8) The supreme court may adopt rules providing an expedited confidential appeal by a petitioner if the youth court denies a petition. An order authorizing an abortion without notice is not subject to appeal.

"(9) Filing fees may not be required of a pregnant minor who petitions a court for a waiver of parental notification or appeals a denial of a petition."

SUPREME COURT OF THE UNITED STATES

MARTIN D. LAMBERT, GALLATIN COUNTY ATTORNEY *v.* SUSAN WICKLUND ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96–858. Decided March 31, 1997

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in the judgment.

We assumed in *Ohio* v. *Akron Center for Reproductive Health,* 497 U. S. 502 (1990) (*Akron II*), that a young woman's demonstration that an abortion would be in her best interest was sufficient to meet the requirements of the Ohio statute's judicial bypass provision. In my view, that case requires us to make the same assumption here. Whether that is a necessary showing is a question we need not reach.

In *Akron II*, we upheld a statute authorizing a judicial bypass of a parental notice requirement on the understanding that Ohio Rev. Code Ann. §2151.85(C)(2) (1995) required the juvenile court to authorize the procedure whenever it determined that "the abortion is in the minor's best interest," *id.*, at 511. Given the fact that the relevant text of the Montana statute at issue in this case, Mont. Code Ann. §50–20–212(5)(b) (1995), is essentially identical to the Ohio provision, coupled with the fact that the Montana Attorney General has advised us that "the best interests standard in §50–20–212(5)(b) [is] either identical to or substantively indistinguishable from the best interests" provision construed in *Akron II*, Pet. for Cert. 7, it is surely appropriate to assume that the Montana provision also requires the court to authorize the minor's consent whenever the abortion is in her best interests. So understood, the Montana statute is

plainly constitutional under our ruling in *Akron II*. Because the Court of Appeals erroneously construed the statute in a manner that caused that court to hold the statute unconstitutional, I agree with the majority that the judgment below should be reversed.*

While a showing that an abortion is in a young woman's best interest is therefore sufficient to satisfy the Montana judicial bypass provision as we understood an analogous statute in *Akron II*, I do not think the Court need address whether the Montana statute can be properly understood to make such a demonstration a necessary requirement. My colleagues suggest that the statute requires a minor "to show that abortion without notification is in her best interests," *ante*, at 6 (emphasis omitted). To the extent this language indicates that a young woman must demonstrate *both* that abortion is in her best interest *and* that notification is not, I think that question is best left for another day. I note, however, that the plain language of the statute makes passably clear that a showing that notification is not in the minor's best interest is alone sufficient. See Mont. Code Ann. §50–20–212(5)(b) (1995) ("[t]he court shall issue an order authorizing the petitioner to consent to an abortion without the notification of a parent . . . if the court finds, by clear and convincing evidence, that . . . the notification of a parent . . . is not in the best

*Our reading of the statute in *Akron II* appropriately recognized that the two inquiries at issue here—whether an abortion is in a young woman's best interest, and whether notifying a minor's parents of her desire to obtain an abortion is in her best interest—are sometimes linked. For example, if a judge finds after careful assessment of all the circumstances that the abortion a young woman seeks would be in her best interest, and determines that notifying her parents is both opposed by the young woman and would likely cause her to be deterred from pursuing the treatment decision that would serve her best, then parental notification is assuredly not in her best interest. Under such circumstances, the proper course for the trial judge would be to permit the abortion without notification.

interests of the petitioner").

Although I therefore do not agree with all of the Court's reasoning, I concur in the majority's view that the judgment of the Court of Appeals must be reversed.